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SHDKT PROCEEDINGS AND ORDERS DATE: [06/24/96]

CASE NBR: [95100879] CFX STATUS: [DECIDED]
SHORT TITLE: [Edmond, OK, et al.]
VERSUS [Robinson, Wayne, et al.] DATE DOCKETED: [120595]
PAGE: [01]

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1	Dec 5 1995	D	Petition for writ of certiorari filed. (Response due January 4, 1996)
2	Jan 4 1996		Brief of respondents Wayne Robinson, et al. in opposition filed.
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7	Mar 28 1996		Record filed.
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11	Apr 15 1996		REDISTRIBUTED. April 19, 1996 (Page 14)

Last page of docket

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15	May 6 1996		REDISTRIBUTED. May 10, 1996 (Page 26)
16	May 13 1996		Petition DENIED. Dissenting opinion by The Chief Justice with whom Justice Scalia and Justice Thomas join. (Detached opinion.)

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(1)

Supreme Court, U.S.
FILED

No. 95-879 DEC 5 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

THE CITY OF EDMOND, a municipal corporation, and RANDEL SHADID, in his capacity as Mayor of the City of Edmond, and CHARLES LAMB, GARY MOORE, RON MERCER and KAY BICKHAM in their official capacities as members of the City Council of the City of Edmond, Oklahoma,

Petitioners,

vs.

DR. WAYNE ROBINSON, CURTIS BATTLES, WENDELL MILLER, BARBARA ORZA, and MARTIN FELDMAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to determine whether a governmental seal containing representations which include a clearly defined religious symbol in a historic or other secular context *per se* violates the First Amendment to the United States Constitution.

2. Certiorari should be granted to resolve the conflict among the Circuits relative to whether the First Amendment to the United States Constitution prohibits a governmental seal from containing any clearly defined religious symbols, regardless of the setting.

PARTIES TO THE PROCEEDING

Petitioners, the City of Edmond, Oklahoma, Randel Shadid in his official capacity as the mayor of the City of Edmond, and Charles Lamb, Gary Moore, Ron Mercer and Kay Bickham in their official capacities as members of the City Council of the City of Edmond, were Defendants in the lower court proceeding before the United States District Court for the Western District of Oklahoma and were Appellees before the United States Court of Appeals for the Tenth Circuit. Respondents, Dr. Wayne Robinson, Curtis Battles, Wendell Miller, Martin Feldman, and Barbara Orza, are individuals who, at the time of the filing of this action in the lower court, either lived or worked in Edmond, Oklahoma. They were Plaintiffs in the lower court proceedings and Appellants before the United States Court of Appeals for the Tenth Circuit. There are no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the October 17, 1995 opinion and judgment of that Court.

OPINIONS BELOW

On October 17, 1995, the United States Court of Appeals for the Tenth Circuit issued its opinion reversing the decision of the United States District Court for the Western District of Oklahoma. The opinion of the Tenth Circuit is reproduced at pages 1a through 19a of the Appendix to this Petition. The Tenth Circuit's opinion was recommended for publication. The memorandum opinion of the District Court was not published but is reproduced at pages 20a through 26a of the Appendix to this Petition.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Tenth Circuit and its judgment of October 17, 1995. That judgment reversed and remanded the District Court's determination with respect to the constitutionality of the municipal Seal of the City of Edmond, Oklahoma. A stay of mandate was issued by the Tenth Circuit Court of Appeals on November 6, 1995, pending petition to this Court for writ of

certiorari. *See* Order at pages 27a through 29a of the Appendix to this Petition. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Religious and Political Freedom.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

STATEMENT OF THE CASE

At issue in this case is the constitutionality of the official Seal of the City of Edmond, Oklahoma, and, by application, of the governmental seals of hundreds of cities and counties throughout the United States. The Seal of Edmond, Oklahoma, is a circular design divided into four sections. Each of these quadrants contains a representation of an aspect of Edmond's history and heritage that significantly contributed to the City's historical development. The Seal depicts a covered wagon commemorating the Land Run of April 22, 1889, the day Edmond was settled. A train and oil well are depicted which represent the importance of Santa Fe Railroad's "Edmond Station" and the oil industry in early Edmond. The left quadrant of the Seal depicts the Old North Tower

on the campus of the University of Central Oklahoma in Edmond, where the *first* classes of higher education in the Oklahoma Territory were conducted. The right quadrant contains a cross, representing the historical significance of early churches in Edmond (all of which happen to have been Christian). St. John the Baptist Catholic Church in Edmond was the *first* church established in the Oklahoma Territory after the Land Run. In the center of the Seal there are two clasped hands. The Seal also contains the motto "A Great Place to Grow." A copy of Edmond's Seal is found at p. 19a in the Appendix to this Petition.

At trial, the undisputed evidence showed that in 1965 the City Officials who selected the design of the Seal did so with the express and specific intent of symbolizing the unique history and heritage of Edmond. The historical collage would be incomplete if any of its elements were removed. There was absolutely no evidence presented at trial that the Seal was adopted for the purpose of promoting religion or proselytizing the citizens of Edmond.

Respondents each lived or worked in Edmond, Oklahoma, at the time the action was filed. The action was filed under 42 U.S.C. § 1983, invoking the District Court's federal question jurisdiction conferred at 28 U.S.C. § 1331. Mr. Feldman is a member of the Jewish faith. The remaining Respondents are members of Respondent Wayne Robinson's Unitarian congregation. The evidence at trial showed the Edmond City Seal was used without incident or question from 1965 until 1992 when Respondents and the ACLU demanded that the cross be removed from the Seal. Respondents' testimony at trial showed, and they

for the most part admitted, that they exhibit unique sensitivities with respect to the personal offense they claim to experience at the sight of the cross on the City Seal.

The District Court relied on this Court's three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The lower court found that the Seal was adopted for the proper purpose of identifying City property and that there was no entanglement of government with religion. The lower court determined, based on the evidence at trial, that the average observer of the City Seal perceives it to be a representation of the City's historical foundations and does not perceive it as conveying a message of governmental endorsement or advancement of religion. From 1965 until the ACLU targeted Edmond's Seal in 1992, there was no controversy regarding the Seal. The evidence showed that whatever controversy now exists regarding the Seal was caused by Respondents and the ACLU.

The *only* witnesses who testified that they perceived the City Seal to endorse Christianity were Respondents. These individuals, whose demeanor and appearance was observed by the trial court, expressed their very strong feelings that any religious symbol, including the "Eye of God" that appears on one dollar bills and the phrase "In God We Trust" that appears on U.S. coins, have no place on any government property and violate the Establishment Clause. Respondents also admitted that they had lived and/or worked in Edmond for a number of years without even noticing that the Seal included among its representations a depiction of a cross.

The District Court, after a two-day trial, found that the evidence showed that an average observer would not perceive that the Seal had the effect of advancing or inhibiting any religion. The District Court determined that the average observer would recognize the Seal for just what it is – a celebration of the history and heritage of Edmond, Oklahoma. *See* Memorandum Opinion at p. 24a in the Appendix to this Petition. The lower court found, "Religion is a part of Edmond's history as are railroads, covered wagons, schools and the land run. The First Amendment prohibits the establishment of religion – it does not mandate that government deny or ignore its existence." *Id.*

The Tenth Circuit Court of Appeals reversed the District Court's judgment, finding that the presence on the Seal of a "visible and clearly defined religious image" inescapably leads to the conclusion that the Establishment Clause of the First Amendment to the United States Constitution has been violated.

Petitioners now seek this Court's review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS ESTABLISHES AN UNCONSTITUTIONAL BRIGHT-LINE TEST IN FIRST AMENDMENT CASES THAT HAS BEEN REJECTED BY THIS COURT.

This case involves important questions having broad ramifications to myriad governmental bodies whose seals

include visible and clearly defined religious symbology. According to the Tenth Circuit's opinion, visible and clearly defined religious symbols simply cannot withstand constitutional scrutiny and therefore must be removed from governmental seals. However, this Court has never been willing to establish such a bright-line test. In fact, throughout Establishment Clause jurisprudence, one dominant theme has emerged – that is, in cases regarding the interpretation of the Establishment Clause, no bright-line test can *or should* be applied. Although this Court has wrestled with the interpretation of the Clause in various applications, this Court has consistently held that the question of whether a governmental action violates the Establishment Clause depends on all of the circumstances of the particular case. As this Court stated in *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984):

> [The inquiry in each Establishment Clause case] calls for line-drawing; no fixed, *per se* rule can be framed . . . . The line between permissible relationships [between government and religion] and those barred by the Clause can [not] be straight and unwavering . . . . The Clause erects a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112.

While the construction of this variable barrier may be difficult, this Court has emphasized that governmental actions must be considered in the context of the "particular physical setting" of the challenged action. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595, 109 S.Ct. 3086, 3102, 106 L.Ed.2d 472 (1989). The

inquiry is "what viewers may fairly understand to be the purpose of the display." *Id.* This inquiry *turns* on the context in which the contested object appears. *County of Allegheny*, 492 U.S. 573, 595, 109 S.Ct. 3086, 3102. "Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S.Ct. 1355, 1370 (1984).

The decision of the Tenth Circuit in this case in reality tacitly rejects this Court's requirement that the challenged activity be viewed in context. Instead, the Tenth Circuit states:

> While we acknowledge that each case must turn on its own facts, and that the particular context and setting of a particular governmental seal or logo is relevant to its fate when challenged under the Establishment Clause, we decline defendants' invitation to carefully and minutely distinguish the Edmond seal from the Bernalillo County seal based upon the particular dimensions of the crosses in the two seals or the secular or non-secular nature of the other elements of the seal . . . . *We too decline to hold that some visible and clearly defined religious images are permissible while other identically visible religious images are not.*

See Opinion at pp. 16a-17a (emphasis added). While initially appearing to acknowledge that there is a requirement that each case be determined on its own facts, the Tenth Circuit went on to create a new test for constitutionality of governmental seals that calls for no such factual determination. That is, according to the Tenth Circuit, if the average observer can recognize the seal as

containing a symbol which has religious meaning, the Establishment Clause is violated.[1]

The effects test in *Lemon* requires that the Court determine whether the challenged activity has the effect of endorsing or advancing religion. No such determination is required by the Tenth Circuit's holding. Under the Tenth Circuit's decision, the only determination necessary is whether the religious symbol is a familiar symbol that is visible and clearly defined. No inquiry is necessary into the effect of the seal, the perception of the average observer, or whether the seal endorses or advances religion. Rather, the Tenth Circuit's opinion requires that all familiar religious symbols be excised from governmental seals, regardless of the particular physical setting.

In other words, the Tenth Circuit holds that governmental seals may celebrate history and heritage as long as the history and heritage do not involve religion. This rigid position has been expressly rejected by this Court. In *Lynch,* this Court provided a long list of references to religious symbology included in our nation's foundational institutions. *Lynch v. Donnelly,* 465 U.S. 676-77, 104

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[1] The Tenth Circuit distinguished the Latin cross, a "very familiar religious symbol," from the LDS (Mormon) church at issue in its opinion in *Foremaster v. City of St. George,* 882 F.2d 1485 (10th Cir. 1989), *cert. denied,* 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990), on the ground that the LDS temple is a less familiar religious symbol than is the Latin cross. Therefore, the Circuit Court explained that it properly remanded *Foremaster* for trial on the issue of the average observer's perception. Opinion at p. 12a n.9. The implication is that no trial is necessary when the religious image is "very familiar."

S.Ct. at 1360-61. This Court noted, for example, that references to our religious heritage are found in the national motto ("In God We Trust") as set forth on this nation's currency as well as in the language of the Pledge of Allegiance to the American flag. *Id.* To allow cities to commemorate all aspects of their unique histories except those aspects related to religion represents hostility toward religion that runs directly counter to Establishment Clause jurisprudence. *See Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *Zorach v. Clauson,* 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948). Justice O'Connor pointed out in her concurring opinion in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 623, 109 S.Ct. 3086, 3117 (1989), that the reason this Court has avoided bright-line tests such as that adopted by the Tenth Circuit is because to draw lines "which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens [would] exhibit not neutrality but hostility to religion." Similarly, Justice O'Connor opined in *Board of Ed. of Kiryas Joel Village School District v. Grumet,* ___ U.S. ___, 114 S.Ct. 2481, 2499, 129 L.Ed.2d 546 (1993), "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test."

Further, had the rationale of the Tenth Circuit been applied in *County of Allegheny,* neither the creche nor the menorah at issue in that case could have withstood judicial scrutiny. The menorah is a visible and clearly defined symbol of the Jewish faith. Under the Tenth Circuit's

rationale, its presence in the City's display would have violated the Establishment Clause.

This Court, however, did not find that the menorah violated the Constitution. Rather, the Court examined the setting, including the secular symbols in the display as a whole and the written message accompanying the display, to determine that the average observer would appreciate that the display was an acknowledgement of the cultural diversity of the city and not an endorsement of the Jewish faith.

It is apparent that the primary effect of Edmond's Seal is to commemorate the history of Edmond, rather than to promote or advance any religion. This is especially true when the cross on the Seal is viewed in the context of the Seal's other clearly secular symbols and in the context of the particular physical settings where the Seal is displayed by the City, all of which are also purely secular.

The trial court carefully considered all the evidence at trial and determined that the average observer would conclude that the Seal depicts the history and heritage of Edmond. The trial court found, based on the evidence presented, that the vast majority of Edmond's citizenry, both the Christian *and* the non-Christian citizens, see the Seal for what it is – a collage of historical symbols celebrating Edmond's unique history and heritage. And that is the exact theme the Seal was designed in 1965 to represent.

The Tenth Circuit's decision has dramatic consequences not just for the City of Edmond but also for all other cities, counties and governmental bodies whose

seals contain any identifiable religious symbology. Without inquiring whether these seals as a whole have the effect of endorsing religion, these governmental bodies must immediately change their seals or risk liability for damages to any willing plaintiffs who might choose to bring suit. As a result, the Tenth Circuit's decision *requires* hostility toward religion. Under the Tenth Circuit's decision, it is only *religious* symbols that must be excised from the seals. The impact of such a decision is far-reaching and unconstitutional.

II.

THE TENTH CIRCUIT COURT OF APPEALS HAS ESTABLISHED A TEST THAT IS CONTRARY TO THE TEST ESTABLISHED BY THE FIFTH CIRCUIT AS WELL AS BY THIS COURT AND ONE THAT IS HOSTILE TOWARD RELIGION.

The opinion of the Tenth Circuit in this case is in direct conflict with the decision of the Fifth Circuit in *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3028, 120 L.Ed.2d 899 (1992).[2] In *Murray*, the Fifth Circuit Court of Appeals upheld the use of a Latin cross on the municipal seal of the City of Austin, Texas. Because the plaintiff (like Respondents here) conceded that the first and third prongs of the *Lemon* test were met, the case turned on the

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[2] The Seventh Circuit has also held similarly to the Tenth Circuit's holding. In *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3025, 120 L.Ed.2d 897 (1992), the Court held "that sectarian religious imagery simply has no place on municipal seals." 927 F.2d at 1402. The seal found unconstitutional in *Harris* had no relationship to history.

application of *Lemon's* "effect" test. In applying the "effect" test, the *Murray* court stated:

> If we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism – and prayer – would fail. The plain wording of the First Amendment does not require this; nor does the Supreme Court.

Id. at 154. Thus, the Fifth Circuit held that the focus is whether the seal, taken *as a whole* and in the particular physical setting in which it is displayed, has the principal or primary effect of advancing or inhibiting religion. *Id.* at 155.

In *Murray*, the court found that, taken as a whole, the City of Austin's seal did not have the primary effect of advancing religion. Instead, the seal had the principal or primary effect of identifying city activity and property and promoting the city's unique role and history. *Id.* at 155. In fact, the court held that any perceived preference of religion by use of Austin's seal was even more remote than the Nativity Scene held constitutional in *Lynch, supra*, the menorah held constitutional in *County of Allegheny, supra*, and the legislative prayer held constitutional in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 330, 77 L.Ed.2d 1019 (1983). However, if the Fifth Circuit had applied the rule announced by the Tenth Circuit in the instant action, the Austin seal would have violated the First Amendment. The visible and clearly defined Latin cross in the Austin seal would have been unconstitutional.

Contrary to the Tenth Circuit's holding, the test set out by this Court is not whether the average observer

would recognize the symbol as one that has religious significance. Before the Court can find an Establishment Clause violation, the Court must determine that an average observer would *primarily* perceive the seal as a whole as conveying a message of *government endorsement or advancement* of religion. *See Lemon v. Kurtzman, supra.*

In the case at bar, the trial court heard the evidence regarding the perceptions of the average observer. As set forth in the Statement of Facts above, it is clear that the evidence strongly suggested that the average observer, unlike Respondents, views Edmond's Seal as a historical representation of the City of Edmond. When viewed as a whole, the Seal presents a collage of the history and heritage of a community that traces its roots to the Land Run of 1889 and to the triumphs and tragedies of pioneer living. Only Respondents, who view all religious symbology as offensive and inappropriate, testified that they viewed the Seal as an endorsement of the Christian religion. The fact of the matter is that when Respondents see the Seal, they see nothing but the cross. They are unable to view the entire collage. No doubt, because of their unique sensitivities, if they viewed the *Lynch* creche in its setting, they would see nothing but the manger and would be similarly offended. However, the test of constitutionality is not based on the perceptions of the city's most hypersensitive citizens but that of an average observer.

The quadrant depicting the cross on Edmond's Seal cannot be viewed in isolation. Rather, the four quadrants of the Seal must be viewed as a whole and in the context for which they were intended. *See Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984).

As the *Lynch* Court noted, "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.* The City Seal, when viewed as a whole, presents a historical picture of Edmond, Oklahoma, that would be incomplete and inaccurate without the inclusion of the cross.

This Court has not yet taken the opportunity to decide a case involving the constitutionality of a governmental seal. Yet it is clear that such cases beg for guidance from this Court. The Circuits are divided in their interpretations of existing law. The lower courts have frequently been reversed because it has been so difficult to decipher the conflicting Circuit Court decisions. The Tenth Circuit has now attempted to make the determination easy by singling out *all* visible and clearly defined religious symbols as unconstitutional. However, this test itself violates the United States Constitution by requiring hostility toward religion. This Court should grant certiorari in this case to resolve the conflict among the circuits and to prevent the far-reaching application of the Tenth Circuit's recently announced rule.

CONCLUSION

The decision of the Tenth Circuit not only conflicts with the Fifth Circuit's holding but also conflicts with the previous rules announced by this Court. The issue of the constitutionality of governmental seals is one affecting hundreds of communities throughout this nation. Although creation of a bright-line test such as that offered

by the Tenth Circuit might serve to make the determination of constitutionality a simple one, it is contrary to what this Court has held, and such a test has constitutional ramifications of its own.

For these reasons, Petitioners request that this Court grant certiorari in this case.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WAYNE ROBINSON; CURTIS BATTLES; WENDELL MILLER; MARTIN FELDMAN,	)	
Plaintiffs-Appellants,	)	No. 94-6237
BARBARA ORZA,	)	
Plaintiff,	)	
v.	)	
CITY OF EDMOND, a Municipal corporation; RANDELL SHADID, individually and in his official capacity as Mayor of the City of Edmond; RON MERCER, individually and in his official capacity as a member of the City Council of the City of Edmond; KAY BICKHAM, individually and in her official capacity as a member of the City Council of the City of Edmond; and GARY MOORE, in his official capacity as a member of the City Council of the City of Edmond,	)	
Defendants-Appellees.	)	

WAYNE ROBINSON; CURTIS BATTLES; WENDELL MILLER; MARTIN FELDMAN, and BARBARA ORZA,

Plaintiffs-Appellants,

v.

CITY OF EDMOND, a Municipal corporation; RANDELL SHADID, individually and in his official capacity as Mayor of the City of Edmond; RON MERCER, individually and in his official capacity as a member of the City Council of the City of Edmond; KAY BICKHAM, individually and in her official capacity as a member of the City Council of the City of Edmond; and GARY MOORE, in his official capacity as a member of the City Council of the City of Edmond,

Defendants-Appellees.

No. 95-6008

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-93-153-R)

(Filed Oct. 17, 1995)

Michael C. Salem, Salem Law Offices, Norman, Oklahoma (Joel Carson, Carson & Mueller, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiffs-Appellants.

Laura Haag McConnell, Hartzog, Conger & Cason, Oklahoma City, Oklahoma, and V. Burns Hargis, McAfee & Taft, Oklahoma City, Oklahoma (Ryan S. Wilson, Hartzog, Conger & Cason, Oklahoma City, Oklahoma, and Stephen T. Murdock, City Attorney, Edmond, Oklahoma, with them on the briefs), for Defendants-Appellees.

Michael L. Tinney, Oklahoma City, on the brief for Amicus Curiae Citizens for Keeping the Cross.

Before **ANDERSON, HOLLOWAY,** and **LUCERO,** Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiffs and appellants, Dr. Wayne Robinson, Curtis Battles, Wendell Miller and Martin Feldman, appeal from the grant of judgment in favor of defendants, City of Edmond, Oklahoma, the City's mayor, Randell Shadid, and its City Council members, Charles Lamb, Gary Moore, Ron Mercer, and Kay Bickham, on plaintiffs' Establishment Clause challenge to the inclusion of a Latin or Christian cross on the City seal. They also appeal the imposition of attorneys fees and costs.[1] For the following

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[1] Appeal No: 95-6008 involves attorneys fees and costs. One additional party, Barbara Orza, is an appellant in No. 95-6008. Ms. Orza initially participated in the main case as a plaintiff, but was unavailable for trial and her claim was dismissed by the district court. She therefore did not participate in appeal No. 94-6237, involving the merits of that case. The

reasons, we reverse and remand on both the merits of this case (Appeal No. 94-6237) and on attorneys fees and costs (Appeal No. 95-6008).

BACKGROUND

At issue in this case is the official seal of the City of Edmond, Oklahoma. The circular seal contains four quadrants, of which one depicts a steam engine and oil derrick, one depicts the Old North Tower,[2] one depicts a covered wagon with the number 1889,[3] and the last quadrant depict a Christian cross. A copy of the seal appears as an appendix to this opinion.

The seal was first adopted in 1965 following a competition sponsored by the City Council and a local newspaper. A local resident, Frances Bryan, designed the seal from her two winning entries. Since 1965 the seal has been used extensively by the City, and appears on City limits signs, on City flags, on the uniforms of City police officers and firefighters, on official City vehicles, on stickers identifying City property, and in the City Council chambers. Additionally, the seal appears on each utility

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district court did assess costs and attorneys fees against her, however, and she has therefore joined appeal No. 95-6008 challenging those fees and costs.

[2] The Old North Tower is a well-known local landmark of what is now the University of Central Oklahoma. It is where the first higher education classes were conducted in the Oklahoma Territory.

[3] The significance of the covered wagon and the number 1889 is that "wagons were used in the Land Run of 1889 the day Edmond was first settled." Mem. Op. at 4; Pls.' Br., Attach 01.

bill sent out by the City, as well as on official City stationery and the Utility and Sanitation Department's newsletter. The seal has been registered as a trademark under Oklahoma law.

Plaintiffs are non-Christians who live or work in Edmond. Mr. Feldman is a Jew who lives in Edmond, Mr. Miller is a member of the Unitarian Congregation who lives and is self-employed in Edmond, Mr. Battles is a member of the Unitarian Congregation who lives in Edmond, and Dr. Robinson is the minister of the Channing Unitarian Church in Edmond. They brought this action under 42 U.S.C. § 1983, claiming that the inclusion of the Christian cross in the City seal violated the Establishment Clause and the Free Exercise Clause of the First Amendment, as well as certain provisions of the Oklahoma Constitution. They named as defendants the City, its mayor, and its City Council members. The mayor and City Council members were sued in both their official and individual capacities. Plaintiffs sought declaratory and injunctive relief, as well as nominal damages.

The district court initially granted defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss plaintiffs' claims against them in their individual capacities. It subsequently granted defendants' motion for partial summary judgment on plaintiffs' claimed deprivation of their rights under the Free Exercise Clause of the First Amendment, and on their state law claim under Article I, § 5 of the Oklahoma Constitution. After a two-day trial to the court, in which eight witnesses testified, the district court granted judgment for defendants, holding that the seal did not violate the Establishment Clause under the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

It also held, without explanation, that the seal was valid under the Oklahoma Constitution. Following judgment, defendants sought costs and attorneys fees, pursuant to 28 U.S.C. § 1920 and 42 U.S.C. § 1988. The district court awarded costs of $5,586.38, and denied all but $2,361.00 of attorneys fees, holding that plaintiffs' claims under the Establishment Clause and their claims against defendants in their individual capacities were not frivolous, unreasonable or without foundation. It held, however, that plaintiffs' claim under the Free Exercise Clause was without foundation, given plaintiffs' admission in their depositions that "they were completely free to exercise their respective chosen religions in the City of Edmond," Order at 3, Pls.' Br., Attach. F3, and that fees and costs were appropriately awarded to defendants for defending such a baseless claim.

On appeal, plaintiffs argue the district court erred in finding for defendants on their Establishment Clause claim.[4] They also claim error in the district court's order requiring plaintiffs to disclose *in camera* to the court a letter sent to plaintiffs by their attorney. Finally, they claim the district court erred in awarding to defendants attorneys fees and costs incurred in responding to plaintiffs' Free Exercise Clause claim, which the court held was frivolous. They in turn seek an award of attorneys fees and costs if they prevail in this appeal. Defendants seek attorneys' fees incurred in defending their award of fees and costs below.

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[4] Plaintiffs do not appeal the dismissal of their Free Exercise clause claim.

DISCUSSION

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. amend. I. The Supreme Court generally applies the three-part test of *Lemon* when evaluating claimed violations of the Establishment Clause.[5] Thus, we continue to apply it to such cases, while recognizing that "[a]lthough the Supreme Court has been unwilling to endorse *Lemon* as the 'be-all' and 'end-all' in Establishment Clause cases, it has continued to apply it almost exclusively." *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 780 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986).

Government action violates the Establishment Clause under *Lemon* if it fails to meet any of the following conditions: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The first and second parts of the test have been modified, or at least recast, to ask whether the challenged government action was intended to endorse, or has the effect of endorsing, religion. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-93 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687-94

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[5] While the *Lemon* test has been criticized by many, including some members of the Supreme Court, and has been declared dead by Justice Scalia, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141, 2149-50 (1993), the Supreme Court has specifically declined to overrule it. *See id.* at 2148 n.7; *see also Lee v. Weisman*, 112 S.Ct. 2649, 2655 (1992).

(1984) (O'Connor, J., concurring); *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990).

Plaintiffs concede that the main issue in this case is whether the City seal violates the second part of the *Lemon* test: whether its primary effect is to advance or inhibit religion, or, in endorsement test terms, whether it conveys or attempts to convey the message "that religion or a particular religious belief is *favored or preferred*." *Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)).[6] In applying this "effects" test, we must consider the " 'particular physical setting' " of the challenged action. *Foremaster*, 882 F.2d at 1491 (quoting *Allegheny*, 492 U.S. at 597). Further, we evaluate the effect "by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action." *Friedman*, 781 F.2d at 781; *see also*, *Foremaster*, 882 F.2d at 1491 ("We inquire what an average observer would perceive when viewing the action of the City.").

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[6] Standing is of course always necessary in an Establishment Clause case, and it is sometimes a difficult issue. No one in this case disputes plaintiffs' standing. Under our case law, plaintiffs clearly have standing. *See Foremaster*, 882 F.2d at 1490 ("Foremaster's allegations of direct, personal contact suffices as non-economic injury.").

Further, because we hold that the City seal violates the second (effects or endorsement) part of the *Lemon* test, we need not address plaintiffs' arguments that the seal also violates the first (purpose) part of the test or the third (entanglement) part of the test. Failure to satisfy any of the three *Lemon* test prongs suffices to support an Establishment Clause violation.

Other cases, including two from our own circuit, have considered whether a government seal or logo containing an unmistakably religious image violates the Establishment Clause. All but one of those cases have held that it does. Finding no principled distinction between those cases and this one, we likewise hold that the Edmond City seal violates the Establishment Clause.

We first addressed this issue in *Friedman*, in which the Bernalillo County seal containing a Latin cross and the Spanish motto "CON ESTA VENCEMOS" was challenged on Establishment Clause grounds. Like the City seal here, the Bernalillo County seal had been used for many years, and used pervasively, appearing on "county documents, stationery, motor vehicles, and the shoulder patches of sheriff's department officers." *Friedman*, 781 F.2d at 779. The district court found no Establishment Clause violation, concluding that the cross was simply an historical depiction of the importance of the Catholic Church in settling the southwest. On appeal, we reversed, holding that under either a clearly erroneous or a de novo standard of review,[7] the lower court erred.

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[7] We acknowledged in *Friedman* that there is some ambiguity concerning the standard for our review of "constituitonal facts" like a district court's findings on each part of the *Lemon* test. We observed that conflicting language in the Supreme Court's *Lynch v. Donnelly*, 465 U.S. 668 (1984), decision suggested either a clearly erroneous or a de novo standard of review could apply, while the Supreme Court's subsequent decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508, 509 (1984), held that the clearly erroneous standard did not apply to appellate review of a finding of malice in a First Amendment case. Because we concluded in *Friedman* that the lower court's findings and conclusions were wrong

In reaching that conclusion, we considered "the seal's composition and use." *Id.* at 782. We noted that the cross was prominent, as "the only visual element on the seal that is surrounded by rays of light." *Id.* Further, the impression conveyed by the cross we described as follows:

> A rabbi testified that the seal suggested to him that there was an "officialness" about Christianity in the state and county. In addition, he pointed out that the cross had at times symbolized outright oppression and persecution of Jewish people. It cannot be denied, as one

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under either standard, we did not decide "which standard applies under the Establishment Clause." *Friedman*, 781 F.2d at 779-80 n.2. Because we reach that same conclusion here – that the district court erred under either standard – we too decline to decide which standard applies. We do note, however, that several other circuits appear to hold that a de novo standard applies. *See Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991), ("It is well-settled that whether a government display violates the first amendment is indeed a question of law. Thus on review we examine the issues *de novo* with 'no deference to the district court's resolution.' ") (quoting *Mather v. Village of Mundelein*, 864 F.2d 1291, 1292 (7th Cir. 1989) (other citations omitted)), *cert. denied*, 112 S. Ct. 3054 (1992); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 941 (1st Cir. 1989) (" 'First Amendment questions of "constitutional fact" compel [the] Court's de novo review.' ") (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion) (citations omitted)), *cert. denied*, 494 U.S. 1066 (1990); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 691 n.3 (9th Cir. 1986) ("We review de novo the question whether the Indian plaintiffs have a valid first amendment claim."), *rev'd on other grounds*, 485 U.S. 439 (1988); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), *vacated for lack of standing*, 475 U.S. 534 (1986).

> amicus brief argues, that the cross probably would have a similarly threatening connotation for a Lebanese Moslem or Northern Irish Protestant. We are compelled to draw the same conclusion with regard to the reactions of Native Americans who reside in Bernalillo County. The seal certainly does not memorialize their "Christian heritage" but rather that of those who sought to extinguish their culture and religion.

Id. at 781-82.

In addition to the particular message conveyed by the actual elements of the seal, we also considered its pervasiveness: "the seal . . . pervades the daily lives of county residents. It is not displayed once a year for a brief period . . . [but r]ather it appears on all county paper work, on all county vehicles, even on county sheriff's uniforms." *Id.* at 782. We therefore concluded that the seal violated the Establishment Clause.[8]

We faced a similar challenge to a city seal in *Foremaster*, in which the challenged seal contained a depiction of the St. George, Utah, temple of the Church of Jesus Christ of Latter-Day Saints ("LDS Church"). The district court granted summary judgment to the city, finding that the illustration of the St. George temple did not have the primary effect of endorsing the LDS Church. We reversed and remanded, finding that there was "a genuine issue of

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[8] *Friedman* was cited with apparent approval by Justice O'Connor in her concurring opinion in *Allegheny*, 492 U.S. at 629, as well as by Justice Kennedy in his opinion concurring in the judgment in part and dissenting in part. *Id.* at 661.

material fact as to what an average observer would perceive when viewing the City logo." *Foremaster*, 882 F.2d at 1491.[9]

In addition to *Friedman* and *Foremaster*, several other cases from other circuits address Establishment Clause challenges to city seals or logos. In *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3054 (1992), and *Kuhn v. City of Rolling Meadows*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3025 (1992), consolidated for decision, the Seventh Circuit held that seal of the city of Rolling Meadows and the seal, emblem and logo of the city of Zion both violated the Establishment Clause. The Rolling Meadows seal contained, in one of its four quadrants, a depiction of a church that was under construction with a Latin cross in front of it. The Zion seal contained a shield on which appeared a Latin cross, a dove carrying a branch, a crown and sword, and the name "Zion." A ribbon above the shield contained the words "God Reigns." Both city seals were used extensively, on city vehicles, the city letterhead, the shoulder

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[9] Defendants argue strenuously that our remand in *Foremaster* for further factual findings on what the average observer would perceive when viewing the logo clearly indicates that such an inquiry is always purely factual, and the district court's findings on that matter are only reversible if clearly erroneous. Thus, so the argument goes, we could not easily reverse the district court's findings about the average observer in this case. We are not convinced *Foremaster*'s holding reveals so much. The question of what the average observer would perceive when looking at a LDS Church temple, a less familiar religious symbol, would probably require more inquiry than the question of what the average observer would perceive when looking at a Latin cross, a very familiar religious symbol.

patches of city police offices and, in Zion, on firefighters as well, and in the City Council chambers.

Addressing first the Rolling Meadows seal, the court observed that it "is a permanent statement that is viewed year-round." *Kuhn*, 927 F.2d at 1412. Further, the seal "acts as the City's imprimatur for official correspondence, property and business." *Id*. The court rejected the city's argument that the presence of other, secular images on the seal "neutralized" any religious message conveyed by the seal. "The images on the seal are not just neutral snapshots of the community; they are charged with endorsement . . . To any observer, the Rolling Meadows seal expresses the City's approval of those four pictures of City life – its flora, its schools, its industry and commercial life, and its Christianity." *Id*. The court therefore concluded that the city seal "endorses Christianity in violation of the first amendment." *Id*. at 1413.

Turning to the Zion seal, the court found that it violated both the purpose and the effects test of *Lemon*. Finding that its indisputably religious purpose when it was originally adopted in 1902 was not diminished by a more recent decision to retain the seal for historical purposes, the court went on to conclude that the seal constituted an unconstitutional endorsement of Christianity. It also rejected Zion's argument that the seal, emblem and logo "merely commemorate the historical origins of the City." *Harris*, 927 F.2d at 1414, stating that "the City may not honor its history by retaining the blatantly sectarian seal, emblem, and logo." *Id*. at 1415. Finally, the court rejected the city's attempts to distinguish its seal from the

one our court had already held unconstitutional in *Friedman*:

> The City of Zion seeks to distinguish its corporate seal from the seal of Bernalillo County by noting that the Latin cross in the Zion seal is smaller and shares space on the seal with a crown, a scepter and a dove. We find this argument a baseless attempt at distinction.

Id.; but see Murray v. City of Austin, 947 F.2d 147, 149 (5th Cir. 1991) (upholding against Establishment Clause challenge a city insignia based upon "the family coat of arms of Stephen F. Austin, the 'father of Texas' and the person after whom the City is named," and which included a Latin cross), *cert. denied*, 112 S.Ct. 3028 (1992).[10]

Because we find no meaningful distinction between the Edmond seal and that of Bernalillo County or the cities of Zion and Rolling Meadows, we hold that

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[10] The Austin insignia appeared extensively throughout the city. The Fifth Circuit rejected the argument that "any time a municipality incorporates a religious symbol within its seal, insignia, or logo – regardless of the history, purpose, or context – the Establishment Clause is violated." *Murray*, 947 F.2d at 156. Instead, the court distinguished *Friedman* by the *Friedman* seal's

> lack of undisputed secular symbols within the seal; the accompanying phrase which translates "With This We Conquer"; the county's relatively recent expanded use of the seal; and that at least one county commissioner knew at the time that the cross represented the role of the Catholic Church in the settlement of the Southwest.

Id. at 157. Concluding that the Austin city seal "in its context, . . . does not endorse religion in any true or meaningful sense of the word 'endorsement.' " the Fifth Circuit upheld its constitutionality. *Id.* at 158.

Edmond's seal violates the Establishment Clause. Like Bernalillo County's seal, and the seals of Zion and Rolling Meadows, the cross is a prominent feature of the Edmond seal.[11] The religious significance and meaning of the Latin or Christian cross are unmistakable. Further, Edmond's use of the seal is as pervasive as the county seal in *Friedman*, and the city seals in *Harris* and *Kuhn*.

Defendants argue that the City seal is permissible because it symbolizes "the unique history and heritage of Edmond." Appellees' Br. at 6. We agree with the Seventh Circuit's rejection of the identical historical argument in *Harris:* "the City may not honor its history by retaining the blatantly sectarian seal. . . . These symbols transcend mere commemoration, and effectively endorse or promote the Christian faith." *Harris*, 927 F.2d at 1415. Such an appeal to history also failed to save the Bermalillo County seal in *Friedman*, and is indeed an argument which could always "trump" the Establishment Clause, because of the undeniable significance of religion and religious symbols in the history of many of our communities. We rejected arguments in *Friedman* that the county seal was permissible because it was not intended to advance religion, stating "[i]f the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution,

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[11] We noted in *Friedman* that the visibility of the cross was significant: "a one-color depiction in which the seal and especially the cross are not easily discernible might not pass the threshold [of impermissible joint church-state authority.]" *Friedman*, 781 F.2d at 781.

regardless of whether it actually is intended to do so" *Friedman*, 781 F.2d at 781.

Defendants further argue that the evidence in this case supports their claim that the "majority of the people in Edmond – the average, everyday Christian and non-Christian citizens" do not view the seal as endorsing religion. That is not determinative. As we observed in *Friedman*.

> It is not decisive that defendants' heraldic and historical experts, and lay witnesses who are members of Christian sects, reacted less emotionally to the seal. It is to be expected that members of Christian sects would be more comfortable with a seal endorsing their beliefs than would individuals who adhere to different beliefs. The comfort of the majority is not the main concern of the Bill of Rights.

Id. at 782. The relevant inquiry is the objective one of what the "average observer" would perceive when viewing the seal. *Foremaster*, 882 F.2d at 1491. On that issue, we must conclude that the average observer would perceive the same sort of endorsement of Christianity which we held such an observer would feel in *Friedman*, and the Seventh Circuit held such an observer would feel in *Harris* and *Kuhn*, when evaluating governmental seals with similarly distinctive crosses.

Finally, defendants attempt to distinguish the Edmond seal from the Bernalillo County seal at issue in *Friedman* by arguing that the other secular elements of the seal effectively neutralize any religious message conveyed by the cross. While we acknowledge that each case must turn on its own facts, and that the particular context

and setting of a particular governmental seal or logo is relevant to its fate when challenged under the Establishment Clause, we decline defendants' invitation to carefully and minutely distinguish the Edmond seal from the Bernalillo County seal based upon the particular dimensions of the crosses in the two seals or the secular or non-secular nature of other elements of the seal. As the Seventh Circuit stated in rejecting the identical argument in *Kuhn*.

> The images on the seal are not just neutral snapshots of the community; they are charged with endorsement . . . [R]egardless of its origins, the [city] seal does promote the selected images it depicts. To any observer, the [city] seal expresses the City's approval of those four pictures of City life – its flora, its schools, its industry and commercial life, and its Christianity.

Kuhn, 927 F.2d at 1412. We too decline to hold that some visible and clearly defined religious images are permissible while other identically visible religious images are not. "Otherwise, we judges will be immersed in the minutiae of graphic design, our rulers and calipers in hand, scrutinizing each symbol for acceptable proportion, color and gloss. With no principled basis for distinguishing one seal from the next, our opinions will be fastidiously fact-bound and our precedent hopelessly abstract." *Murray*, 947 F.2d at 170 (Goldberg, J., dissenting).

In sum, we hold that under applicable Tenth Circuit and Supreme Court authority, the Edmond City seal violates the Establishment Clause. The district court erred in

concluding otherwise. We therefore reverse and remand for further proceedings consistent with this opinion.[12]

Because we reverse and remand this case, and find in favor of plaintiffs, plaintiffs are now the prevailing parties for purposes of the attorneys fees provisions of 42 U.S.C. § 1988. This casts in a new light the determination of any fee awards in this case. We accordingly remand the issue of attorneys fees and costs to the district court for a redetermination in light of this opinion.

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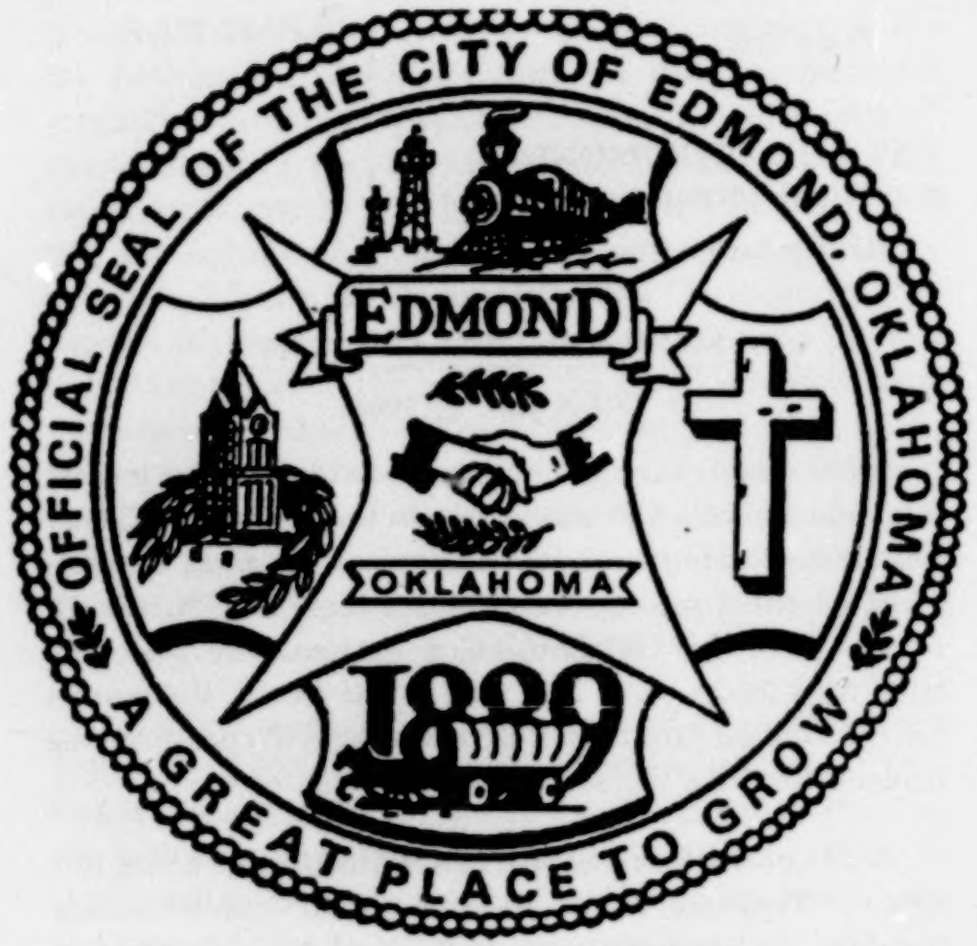
[12] Plaintiffs have additionally argued that the district court erred in requiring *in camera* production of a letter from plaintffs' counsel to plaintiffs, in violation of the attorney/client privilege. As defendants point out, plaintiffs identify no prejudice or damage stemming from this claimed error, and they fail to address the issue at all in their reply brief. We accordingly decline to address the issue.

APPENDIX "A"



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DR. WAYNE ROBINSON, CURTIS BATTLES, WENDELL MILLER, BARBARA ORZA and MARTIN FELDMAN,	)	
Plaintiffs,	)	**CIV-93-153-R**
v.	)	
THE CITY OF EDMOND, a municipal corporation, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

(Filed Jun. 1, 1994)

This case is brought by five individuals who protest the inclusion of a Christian cross in the seal of the City of Edmond, Oklahoma as in violation of the First Amendment to the United States Constitution and Article II, Section 5 of the Oklahoma Constitution. The case was tried May 24-25, 1994 in a trial to the Court, the parties having waived jury trial. The following will constitute the Court's findings of fact and conclusions of law.

Four of the five Plaintiffs have standing to bring this action.[1] They are taxpayers in Edmond and ultimately their tax dollars have gone toward payment for the seal in question. Additionally, the seal has affected the behavior of at least some of the Plaintiffs. *See Foremaster v. City*

[1] No evidence was presented in behalf of Plaintiff Barbara Orza and her claim is dismissed.

of St. George, 882 F.2d 1485, 1489-91 (10th Cir. 1985), *cert. denied*, 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

In 1965 the City Council for the City of Edmond decided that it wanted a seal to identify city property and personnel. Through a local newspaper, a contest was run for persons to submit drawings for the proposed seal. According to a newspaper article at the time "contest entries should reflect the factors which make Edmond the finest small city in Oklahoma – her birth in the Run of '89, the college and the culture, commerce, agriculture and downright friendliness of the city." A local resident, Francis Bryan, submitted two entries which won the first and third prizes in the contest. The City Council was not entirely satisfied with the first place entry and asked Mrs. Bryan to combine her two submissions into a seal which reflected the history of Edmond. She did so and ultimately came up with the design which became the Edmond Seal. See Appendix A. The seal is used on city property, stationery and uniforms.

The seal was used without incident or question from 1965 until 1992 when several members of a local Unitarian Church including its pastor protested to the City the inclusion of the Christian cross in the seal. Three of the Plaintiffs are Unitarian and one is Jewish. Ultimately, the City refused to remove the cross from the seal and this case ensued.

The Edmond seal contains four quadrants. One quadrant depicts a steam engine and oil derrick, another Old North Tower, another a covered wagon and the number 1889 and one quadrant depicts the Christian cross.

As indicated, the Plaintiffs contend that the inclusion of the cross in the official seal constitutes such promotion of the Christian faith that it violates the Establishment Clause of the Constitution.

There have been a number of cases in several circuits which have dealt with the use of religious symbols in official city seals. As the seals have varied, so have the results. *See Gonzalez v. North Township of Lake County,* 4 F.3d 1412 (7th Cir. 1993); *Murray v. City of Austin,* 947 F.2d 147 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 3028, 120 L.Ed.2d 899 (1992); *Harris v. City of Lion,* 927 F.2d 1401 (7th Cir. 1991), *rehearing en banc denied,* 934 F.2d 141 (7th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 3025, 120 L.Ed.2d 897 (1992); *Friedman v. Board of County Commissioners of Bernadillo County,* 781 F.2d 777 (10th Cir. 1985), *cert. denied,* 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1990).

In *Foremaster v. City of St. George,* 882 F.2d 1485 (10th Cir. 1989), *cert. denied,* 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990), the Tenth Circuit last considered the inclusion of religious symbols in a city seal. In *Foremaster,* the Court applied the First Amendment analysis set out in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In order to survive an Establishment Clause challenge, *Lemon* requires that government action meet these conditions: (1) it must have a secular purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. 403 U.S. at 612, 91 S.Ct. at ___, 29 L.Ed.2d at 755.

Applying the *Lemon* analysis to the present case, the Court finds that the City of Edmond seal meets all three conditions. First, the seal's purpose was and is secular. It was created for the purpose of identifying city property and personnel. The items included were for the purpose of showing Edmond's history and heritage.

Second, the Court is satisfied that the primary effect of the seal neither advances nor inhibits religion. In *Foremaster,* the Court said that the finder of fact must determine whether the depiction (the temple in the context of the St. George logo) conveys primarily a message of government endorsement and advancement of religion. 882 F.2d at 1491-92. In this regard, the Court must determine what an average observer would perceive when viewing the city seal. 882 F.2d at 1491. Although the testimony was in conflict and perception is in the eye of the beholder, the Court finds that the average observer would conclude that the seal taken as a whole primarily depicts the history and heritage of Edmond as opposed to conveying primarily a message of endorsement or enhancement of a religion.[2] Obviously, not everyone who views the seal will be completely aware of the history the seal is intended to depict. Perhaps only a historian would realize that Old North Tower is the building where the first classes of higher education were conducted in the

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[2] From the evidence the Court has heard and seen it appears that on one side there are the Plaintiffs who believe the cross conveys a message of the establishment of the Christian religion and they believe this is bad. On the other end of the spectrum are those who agree with the Plaintiffs about the message and believe this is good. The vast middle see the seal for what it is – in this instance, a collage of historical symbols.

Oklahoma Territory; or that covered wagons were used in the Land Run of 1889 the day Edmond was first settled; or that steam engines and railroads played a role in the early development of Edmond; and finally that Christian churches, including St. John's Catholic Church, which was the first church established in Oklahoma Territory, played a significant part in the history of Edmond. However, it is not necessary to be a historian to look at the seal and observe that it conveys a message of history. The cross in isolation could be seen as solely a religious symbol. But because the cross is accompanied by other depictions on the seal, the Court believes a person must reach to believe it is there for the purpose of "enhancing or inhibiting religion." Religion is a part of Edmond's history as are railroads, covered wagons, schools and the land run.[3] The First Amendment prohibits the establishment of religion – it does not mandate that government deny or ignore its existence.

In *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), in permitting the display of a creche at Christmas paid for with city funds, the Supreme Court with approval recognized that "[t]here are countless . . . illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." 465 U.S. at 677, 104 S.Ct. at ___, 79 L.Ed.2d at 612. Likewise, in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct.

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[3] Until recently, there were no non-Christian Churches in Edmond. There is now the Unitarian Church and a Moslem prayer chapel.

3086, 106 L.Ed.2d 472 (1989) in allowing a menorah (a Jewish religious symbol) to remain on display outside a courthouse along with other secular Christmas symbols the Court said "the City's *overall* display must be understood as conveying the City's secular recognition of different traditions for celebrating the winter-holiday season." 492 U.S. at 620, 109 S.Ct. at ___, 106 L.Ed.2d at 511-12 (emphasis added).

The final prong of the *Lynch* test is whether the depiction fosters excessive entanglement of the Government with religion. There is *no* evidence of entanglement of the City with religion other than the fact of the cross being in the seal. There is no evidence that any church played any role in its inclusion or its continuation.

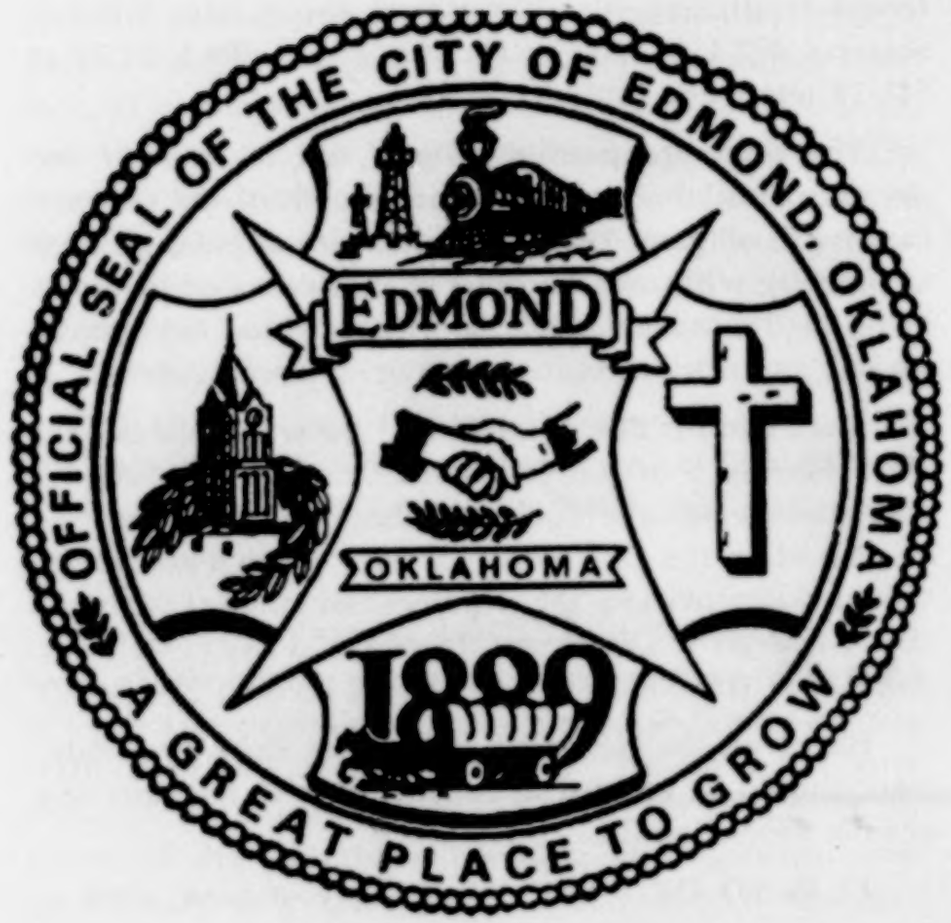
The Plaintiffs also contend that the seal violates Article II Section 5 of the Oklahoma Constitution. Without going into extensive analytical discussion, suffice it to say, based on the Oklahoma Supreme Court's interpretation of that provision, the seal does not violate Oklahoma law. *See Meyer v. Oklahoma City*, 496 P.2d 789 (1972), *cert. denied*, 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed.2d 244 (1972).

Based on the foregoing, the Court finds that judgment should be entered in behalf of the Defendants and against each Plaintiff.

IT IS SO ORDERED this 1st day of June, 1994.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX "A"



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WAYNE ROBINSON; CURTIS BATTLES; WENDELL MILLER; MARTIN FELDMAN,	)	
Plaintiffs-Appellants,	)	
BARBARA ORZA,	)	
Plaintiff,	)	
v.	)	No. 94-6237
CITY OF EDMOND, a Municipal corporation; RANDELL SHADID, individually and in his official capacity as Mayor of the City of Edmond; RON MERCER, KAY BICKHAM, GARY MOORE, in their official capacities as members of the City Counsel of the City of Edmond,	)	
Defendants-Appellees.	)	

WAYNE ROBINSON; CURTIS BATTLES; WENDELL MILLER; MARTIN FELDMAN; BARBARA ORZA,

Plaintiffs-Appellants,

v.

No. 95-6008

CITY OF EDMOND, a Municipal corporation; RANDELL SHADID, individually and in his official capacity as Mayor of the City of Edmond; RON MERCER, individually and in his official capacity as a member of the City Council of the City of Edmond; KAY BICKHAM, individually and in her official capacity as a member of the City Counsel of the City of Edmond; GARY MOORE, in their official capacities as members of the City Counsel of the City of Edmond,

Defendants-Appellees.

ORDER

Filed November 6, 1995

Before ANDERSON, HOLLOWAY, and LUCERO, Circuit Judges.

Appellees' motion to stay the mandate in the captioned case pending application to the Supreme

Court for a writ of certiorari is granted. It is ordered that the issuance of the mandate is stayed until December 6, 1995. If, on or before that date, there is filed with the clerk of this court a notice from the Clerk of the Supreme Court that appellees have filed a timely petition for writ of certiorari in that court, the stay shall continue until final disposition in the Supreme Court.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ Opal A. Carter
Opal A. Carter
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-879

In The
Supreme Court of the United States
October Term, 1995

THE CITY OF EDMOND, A MUNICIPAL CORPORATION, AND **RANDEL SHADID**, IN HIS CAPACITY AS MAYOR OF THE CITY OF EDMOND, AND **CHARLES LAMB, GARY MOORE, RON MERCER** AND **KAY BICKHAM** IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF EDMOND, OKLAHOMA,
Petitioners,

v.

DR. WAYNE ROBINSON, CURTIS BATTLES, WENDELL MILLER, BARBARA ORZA, AND **MARTIN FELDMAN,**
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Seal of the City of Edmond, Oklahoma, which inculcates a readily identifiable religious symbol (a Latin or Christian cross), violate the *Establishment Clause* of the *First Amendment* as an impermissible endorsement of religion?

2. Is there an actual conflict of law among the circuit courts regarding the inculcation of religious symbols on official governmental seals which requires resolution by this Court?

LIST OF PARTIES

The parties to this proceeding on *Petition for Writ of Certiorari* are:

PETITIONERS:

Defendants in the federal district court and Appellees in the United States Court of Appeals for the Tenth Circuit:

THE CITY OF EDMOND, A municipal corporation, and RANDEL SHADID, in his capacity as Mayor of the City of Edmond, and CHARLES LAMB, GARY MOORE, RON MERCER and KAY BICKHAM, in their official capacities as members of the City Council of the City of Edmond, Oklahoma.

SUCCESSOR PETITIONERS (Pursuant to **Rule 35(3)** of the **Rules of the Supreme Court**):

Pursuant to **Rule 35(3)** of the **Rules of the Supreme Court**, the following persons are substituted as parties in their official capacities:

BOB RUDKIN is substituted for RANDEL SHADID as Mayor of the City of Edmond;

STEVE KNOX and BARRY RICE are substituted for RON MERCER and KAY BICKHAM in their official capacities as members of the City Council of the City of Edmond.

Party(ies) previously dismissed in the federal district court by agreement of the parties:

MAX SPEEGLE, former City Manager of the City of Edmond who has now been succeeded in office by LEONARD MARTIN (No longer a party).

Party(ies) previously substituted in their official capacity by resignation or end of term:

TOM KENNEDY, former City Councilmember;
JIM ROBERTS, former City Councilmember.

RESPONDENTS:

Plaintiffs in the federal district court, Appellants in the United States Court of Appeals for the Tenth Circuit and now Respondents in this proceeding:

DR. WAYNE ROBINSON
CURTIS BATTLES
WENDELL MILLER
BARBARA ORZA and
MARTIN FELDMAN.

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I. A CITY SEAL THAT INCORPORATES A "VISIBLE AND CLEARLY DEFINED" LATIN OR CHRISTIAN CROSS IMPERMISSIBLY PROMOTES AND ENDORSES AN ESTABLISHMENT OF RELIGION WHEN THE CITY: OBTAINS TRADEMARK REGISTRATION FOR THE SEAL TO PERPETUATE ITS EXCLUSIVE USE BY THE CITY; PROMOTES IDENTIFICATION OF THE SEAL WITH THE CITY BY USING THE SEAL ON CITY CORRESPONDENCE, DOCUMENTS AND VEHICLES; AND USES THE SEAL TO EXCLUSIVELY IDENTIFY CITY PROPERTY AND PERSONNEL 14

II. A "DIVISION" IN THE CIRCUITS? NOT REALLY. THE ONLY "BRIGHT LINE RULE" IN THIS CASE IS THE TENTH CIRCUIT'S REFUSALS TO RECONSIDER ITS PRIOR PRECEDENT OR TO REACH BEYOND "PRINCIPLED DISTINCTION" AND DISTINGUISH THIS CASE FROM ITS PRIOR DECISIONS OR THOSE OF THE SEVENTH CIRCUIT 24

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No. 95-879

In The

Supreme Court of the United States

October Term, 1995

THE CITY OF EDMOND, A MUNICIPAL CORPORATION, AND **RANDEL SHADID**, IN HIS CAPACITY AS MAYOR OF THE CITY OF EDMOND, AND **CHARLES LAMB**, **GARY MOORE**, **RON MERCER** AND **KAY BICKHAM** IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF EDMOND, OKLAHOMA,

Petitioners,

v.

DR. WAYNE ROBINSON, **CURTIS BATTLES**, **WENDELL MILLER**, **BARBARA ORZA**, AND **MARTIN FELDMAN**,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

DR. WAYNE ROBINSON, CURTIS BATTLES, WENDELL MILLER, BARBARA ORZA, and MARTIN

FELDMAN, Respondents,[1] come before this Court and respectfully request that this Court deny Petitioners'[2] *Petition for Writ of Certiorari* which seeks review of a decision of the Tenth Circuit. That decision is reported as *Robinson, et al., v. City of Edmond, et al.*,[3] 68 F.3d 1226, 1995 WL 611332 (10th

---

[1]Respondents are plaintiffs in the district court and appellants in the Tenth Circuit. They will be referenced individually by name or collectively as "Respondents" or "Plaintiffs."

[2]Petitioners are defendants in the district court and appellees in the Tenth Circuit. In this *Response*, Petitioners will be referred to as "Defendants," "Petitioners" or "Defendant City."

Petitioners failed to name as "successors in office" three substituted Defendants in their official capacity as required by **Rule 35(3)** of the **Rules of the Supreme Court of the United States**. A complete list of all prior and substituted parties (including previously dismissed parties) appears as a *List of Parties* on Page ii of this *Response*. Although Petitioners used in the style of their *Petition* only the names of the official capacity Defendants from the appellate level, failed to name substituted parties, and incorrectly stated that "[t]here are no other parties to this action" (*Pet. Writ Cert.*, p. ii), Respondents adopt the same style in this *Response* to minimize confusion.

[3] Inexplicably, Petitioners join Barbara Orza to the extension of litigation into this Court yet seek no review of any issue related to the only appeal in which Ms. Orza participated in the Tenth Circuit, No. 95-6008 (the appeal of sanction of attorneys fees and costs imposed against Plaintiffs).

Ms. Orza, a master's degree certified midwife and instructor at the University of Oklahoma School of Medicine, was a Plaintiff in the district court. Because her employment moved out of state and this matter was called for nonjury trial with little lead time, she was unable to attend the trial and did not testify. The City would not stipulate to her testimony by deposition and she was dismissed. (See *Pet. Writ Cert.*, Footnote 1, p. 20a)

Because she was unable to testify, Ms. Orza was not included in the merits appeal, No. 94-6237, but did participate in the appeal of sanctions (attorneys fees and costs) imposed by the district court because she was (continued...)

Cir., October 17, 1995) and is reprinted in the *Petition for Writ of Certiorari* (**Appdx A**, p. 1a). The unreported federal district court decision is reprinted in the *Petition* (**Appdx**, p. 20a).

In deciding this case, the Tenth Circuit made a straightforward application of its prior decisions in faithful consideration of the decisions of this Court. Despite Petitioners' enthusiasm for bringing circuits into conflict, there is no material or substantial difference in law in decisions of the Fifth, Seventh and Tenth Circuits that requires resolution by this Court.

The Tenth Circuit, contrary to Petitioners' claim, does not define a new test for applying the *Establishment Clause* of the *First Amendment* to religious symbols on public emblems. Rather, the Circuit continues to consider such questions on a case by case basis (see *Pet. Writ Cert.*, pp. 16a-17a (". . each case must turn on its own facts, and . . . the particular context and setting of a particular governmental seal or logo is relevant to its fate when challenged under the Establishment Clause. . .")), and to apply this Court's interpretation of the

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[3](...continued)
included in the sanction judgment. (See *Pet. Writ Cert.*, Footnote 1, pp. 3a-4a; 68 F.2d at 1228-9) The Tenth Circuit summarily reversed the judgment of sanctions in 95-6008. (*Pet. Writ Cert.*, p. 18a; 68 F.2d at 1233) Petitioners have not preserved as a question, nor have they included, the original sanction order entered by the district court as a part of their Petition and appear therefore to have abandoned an appeal of the reversal of sanctions. See *Capitol Square Review and Advisory Bd. v. Pinette*, 30 F.3d 675 (6th Cir., 1994) *affirmed*, 115 S.Ct. 2440, 2445 (1995)(No review for issue not decided by circuit court nor presented to Supreme Court); also see **Rule 14(1)(a)** of the **Rules of the Supreme Court of the United States** (Only questions set out in the petition, or fairly included therein, will be considered by the Court).

Establishment Clause of the *First Amendment* as it has evolved over the past twenty-five years. (See *Pet. Writ Cert.*, pp. 7a-14a)

The Tenth Circuit's statement and application of the law are a faithful review of this Court's precedents, including the relevant prongs enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *reh. den.* 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); and *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3300, 77 L.Ed.2d 1019 (1983).[4]

The "bright line" of which these Petitioners complain (*Pet. Writ Cert.*, pp. 5-6, 9, 14-15) is more their invention than the Tenth Circuit's rule. The only "bright line" that the Tenth Circuit identifies is that it will follow its precedents and those of similar cases from the Seventh Circuit because there is no principled, demonstrable difference between the physical depictions of the Seal of the City of Edmond and the seals at issue in prior decisions by the Tenth[5] or Seventh[6] Circuits.

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[4]Petitioners incorrectly cite *Marsh* as 103 S.Ct. 330.

[5]See *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir., 1985) *cert. den.* 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1986) and *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. den.* 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990).

[6]*Kuhn v. City of Rolling Meadows*, 927 F.2d 1401 (7th Cir., 1991) *reh. den.* 934 F.2d 141 (7th Cir., 1991) *cert. den.* 112 S.Ct. 3025, 120 L.Ed.2d 897 (June 29, 1992) *reh. den.* 113 S.Ct. 20, 120 L.Ed.2d 946 (Sept. 4, 1992); *Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401 (7th Cir., 1991) *reh. den.* 934 F.2d 141 (7th Cir., 1991), *cert. den.* 112 S.Ct. 3054, 120 L.Ed.2d 920 (June 29, 1992) *reh. den.* 113 S.Ct. 20, 120 L.Ed.2d 946 (Sept. 4, 1992).

Nor does the Tenth Circuit's decision here bring it into a conflict with the Fifth Circuit sufficient to merit consideration by this Court. Both the Tenth Circuit and the Fifth Circuit consider these cases of religious imagery in the specific factual contexts of their respective appearances.[7]

This Court previously denied certiorari in each of these cases.[8] Petitioners offer no compelling reason why the question they now raise is any more susceptible to consideration than similar questions were over three years ago. No argument proffered by Petitioners justifies acceptance of certiorari as to *Robinson* over and above the same or similar issues presented at the time of denial of certiorari in *Harris v. City of Zion*, *Kuhn v. City of Rolling Meadows* and *Murray v. City of Austin*.

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[7] See *Murray v. City of Austin, Texas*, 947 F.2d 147 (5th Cir., 1991) *cert. den.*, 112 S.Ct. 3028, 120 L.Ed.2d 899 (June 29, 1992). Without debating the correctness of that decision, Plaintiffs claim that *Murray* and this case arguably are distinguishable on their facts. In *Murray* the cross on the Austin, Texas seal is almost lost in the background of the overall image by reason of its relative size. (See Figure, p.25) It is not the dominant image of the cross as represented on the Edmond Seal. Additionally, while the Austin seal was an adaptation of the historical "coat of arms" of Stephen Austin, Edmond draws upon no such clear historical legacy for the cross on its Seal. Instead, Defendants advance self-serving declarations about general historical contexts, claims contradicted by contemporary writings. The cross on the Edmond Seal derives from **no** particular occurrence in the history of Edmond, but is instead a simple representation of a traditional Christian symbol created by Frances Bryan, its designer.

[8]In fact, denials of certiorari of *Kuhn v. City of Rolling Meadows*, *Harris v. City of Zion* and *Murray v. City of Austin* all occurred on the same day, June 29, 1992. See Footnotes 6 and 7. *Kuhn* and *Murray* were determined on questions of "effect" and "endorsement." *Harris* included "purpose." The instant case was also decided on "effect" and "endorsement" and not on any issue of "purpose."

As such, this case falls far outside the boundaries of this Court's **Rule 10**.[9] Although this Court has not decided the precise issues raised by Petitioners' claim, the decision by the Tenth Circuit applies properly stated rules of law from this Court's decisions, is consistent with its own precedents, and is not in critical division with other circuit courts, nor is there any serious departure from accepted principles that requires the superintending force of this Court.

[9]Amended **Rule 10** (effective October 2, 1995) provides in part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> - - - - -
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

QUESTIONS PRESENTED

1. Does the Seal of the City of Edmond, Oklahoma, which inculcates a readily identifiable religious symbol (a Latin or Christian cross), violate the *Establishment Clause* of the *First Amendment* as an impermissible endorsement of religion?

2. Is there an actual conflict of law among the circuit courts regarding the inculcation of religious symbols on official governmental seals which requires resolution by this Court?

STATUTORY AND CONSTITUTIONAL PROVISIONS

Amendment I.[10] *Constitution of the United States*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Ratified effective December 15, 1791)

[10]The phrase "Religious and Political Freedom" which Petitioners include in their indented recitation of the *First Amendment* (*Pet. Writ Cert.*, p. 2), although aspirationally noble, appears nowhere in the original text of the first Ten Amendments to the *Constitution of the United States*.

***Amendment XIV*. Section 1.** *Constitution of the United States*

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Ratified effective July 9, 1868)

United States Code, Title 42:

§1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

COUNTER-STATEMENT OF THE CASE

Respondents do not agree that the statement of the case presented by Petitioners is an accurate statement of facts material to consideration of the questions presented by this case. While the Tenth Circuit's recitation of facts is a reliable statement of those facts necessary to its decision (*Pet. Writ Cert.*, pp. 3a-6a), Petitioners have "charged" their statement of the facts with irrelevant insinuations and factual inaccuracies.

Respondents, mindful of their obligation under **Rule 15.2** of the **Rules** of this Court to correct any "perceived misstatement of fact or law in the Petition that bears on what issues properly would be before the Court if certiorari were granted," respectfully draw the Court's attention to Petitioners' inaccurate recitations, even as Respondents contend they are, in part, irrelevant.

In 1965, the City of Edmond City Council declared a contest to select a City Seal. It was sponsored by a local paper, the *Edmond Sun*, and prize money was funded by the City.[11] (Tr. 317 (Bryan); Tr. 340, 350 (Priest)) The minutes of the City Council meetings do not reflect any criteria for contest entries. (Tr. 354, (Priest); (Res. Appdx., pp. 8a-9a); See **Applt. Appdx.**- Vol. 1, Pl. Exs. 16, 17, 19, 20, 21 (Excerpts of City Council Minutes for 7/6/65, 8/16/65, 9/3/65)) Other sources of the time provide the only substantive record of entry rules. Newspaper articles announcing the contest describe entry criteria as ". . . black India ink on the whitest paper available" ((Res. Appdx.,

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[11]References in this *Response* to the Transcript of Nonjury Trial Proceedings on May 24 and May 25, 1994, will be as follows: (Tr. ____, (Witness Name, if appropriate)). Respondents also include an Appendix of some exhibits introduced into evidence.

pp. 10a-14a); **Applt. Appdx.**-Vol. 1, Pl. Ex. 122) or " . . . factors which make Edmond the finest small city in Oklahoma -- her birth in the Run of '89, the college, and the culture, commerce, agriculture and downright friendliness of her people." (**Applt. Appdx.**-Vol. 1, Pl. Ex. 123) After the contest closed, another article characterized the submitted entries as follows, "Most of the entries stressed Edmond's cultural and commercial factions, its 'churchiness,' and the friendliness of its residents. Almost all entries included in their designs a sketch of Old North tower." (**Applt. Appdx.**-Vol. 1, Pl. Ex. 124) If, as Petitioners appear to urge in their *Statement of the Case*, the criteria were exclusively "historical," it was a secret well hidden from public announcements of the contest.

Plaintiffs challenged assertions by Jerry Priest (a City Councilmember at the time of the contest to select a Seal) that the object of the Seal contest was a historical depiction of the beginning of Edmond in the Land Run of 1889. Priest could not explain the failure to mention any of these criteria in the official minutes of council meetings and announcements and other accounts of the contest published in local newspapers.

Petitioners incorrectly characterize as "undisputed" their assertion that ". . . in 1965 the City Officials who selected the design of the Seal did so with the express and specific intent of symbolizing the unique history and heritage of Edmond. The historical collage would be incomplete if any of its elements were removed." (*Pet. Writ Cert.*, p. 3)

Frances Bryan, the contest winner and Seal designer, initially testified at trial that the references in the winning design were historical, but she subsequently admitted that her two entries contained contemporary as well as historical symbols and said that must have been her interpretation at the

time.[12] (Tr. 317-8, 321-7)(**Applt. Appdx.**-Vol. 1, Pl. Ex. 5; Pl. Ex. 7) She also claimed that while the cross had a dual meaning that was both "modern and historical" she was sure that the contest judges intended it as historical although she did not recall any conversations she had with the judges or the city council members. (Tr. 332) Nor were the words, "A great place to grow" historical, and she described them (after a suggestion from the district court) not as a historical reference but as a ". . .projection for the future." (Tr. 333-4)

It is also incorrect to state to this Court that "There was absolutely no evidence presented at trial that the Seal was adopted for the purpose of promoting religion or proselytizing the citizens of Edmond." (*Pet. Writ Cert.*, p. 3) Jerry Priest testified emphatically that the depiction of "Old North Tower" representing the University of Central Oklahoma was placed opposite the "cross" on the Seal to illustrate the particular union between the schools and the churches.[13]

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[12]Ms. Bryan was reminded of her deposition testimony in reference to the Seal finally adopted by the City, "Yes. Everything on there should be representative of the City of Edmond in some capacity, either historical **or present day**." (Tr. 329-31) (emphasis added) Although she tried to disavow this earlier testimony, she admitted she did not list this "error" on her errata sheet when reviewing her testimony, even though she corrected other errors.

[13]
2 Q. And in fact, the town's activities everywhere was engaged
3 in some way or the other with the churches?
4 A. With the churches or the schools. If you didn't go to
5 school or have kids in school or go to a church, you didn't
6 have any social activities.
7 Q. Is there any significance to the fact that the University
8 of Central Oklahoma -- the Old North Tower is on one side and
9 the cross is on the other?

(continued..)

Priest's testimony leaves little doubt that the cross was intended to emphasize Christian culture in the community. The balancing of the cross on one side and the school on the other symbolized a union between the schools and churches.[14]

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[13](...continued)

10 A. Yeah, they were equal or about equal in the development of
11 the civilization that Edmond had at that time. Without one, we
12 would be completely lost. Or the other, we would have been
13 lost. Wouldn't have been any development.
14 Q. I'm sorry. I didn't mean to interrupt you.
15 A. That's okay.
16 Q. Is it fair so (sic) say, then, that the seal, as it was adopted,
17 and certainly within your understanding, was intended to
18 balance off against the -- together, the church, represented
19 by the cross, and the school, together, those were balanced on
20 either side and that's why you put them on the right and the
21 left?
22 A. It could be construed to be true, yes.

Tr. 366 (Priest) (Emphasis added)

[14]Respondents point out that the Tenth Circuit did not analyze the "purpose" element of *Lemon*, so Petitioners' reference to "purpose" testimony is not only inaccurate but irrelevant and gratuitous.

While there was testimony from some of the witnesses, including Frances Bryan, about the significance of the various elements of the Seal, these "explanations" are not readily apparent from a visual review of the Seal. Regardless, these explanations are more relevant to consideration of the "purpose" prong of *Lemon v. Kurtzman* and contribute little to the "effects" prong analysis made by the Tenth Circuit. See *Harris v. City of Zion*, 927 F.2d at 1413 ("First, the purpose for the adoption of Zion's unique seal was primarily sectarian. In its adoption of its seal, Zion abandoned fundamental neutrality and acted with the intent to advance a particular religious viewpoint.") In contrast, the "effects" prong asks "whether, irrespective of

(continued...)

Plaintiff Martin Feldman testified that he first noticed the Seal in 1988 when he first saw a "Welcome to Edmond" display under construction that contained the Seal. (Tr. 22-3) His initial reaction in 1988 was to call the City Manager and suggest that as a Jew, he was offended that the City included this Christian symbol on its official Seal. (Tr. 27-8) Nevertheless, Petitioners inaccurately assert "The evidence at trial showed the Edmond City Seal was used without incident or question from 1965 until 1992 when Respondents and the ACLU demanded that the cross be removed from the Seal." (*Pet. Writ. Cert.*, p. 3)[15]

Finally, Defendants seem to make reference to an identification between the cross on the Seal and "St. John the Baptist Catholic Church," the "*first* church established in the

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[14](...continued)

the government's actual purpose, the practice ... conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 1366, 79 L.Ed.2d 604 (1984). That is not to say that history plays no part in the "effect" or "endorsement" tests, but "... history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Allegheny County* 492 U.S. at 603.

[15]This is not the only reference in the *Petition* to the beginning of the controversy. Petitioners make a similar inaccurate assertion in their review of the district court's decision. (*Pet. Writ Cert.*, p. 4)("From 1965 until the ACLU targeted Edmond's Seal in 1992, there was no controversy regarding the Seal. The evidence showed that whatever controversy now exists regarding the Seal was caused by Respondents and the ACLU.") That a controversy does not become public until the public litigation begins should be no surprise when City officials ignore or refuse to act on complaints as they did for Martin Feldman's objections in 1988 and those of Wayne Robinson and the other Plaintiffs in 1992. It seems relatively clear that such Defendants could not identify with the lack of "principled distinction" or "principled basis" that concerned the Tenth Circuit (*Pet. Writ Cert.*, pp. 9a, 17a) and so would not voluntarily change the Seal themselves.

Oklahoma Territory after the Land Run." (*Pet. Writ. Cert.*, p. 3) This reference, as with several other identifications Petitioners make regarding the symbols on the Seal, cannot be reached without resort to evidence extrinsic to the Seal itself because there is **no** identification between the generic cross created by Frances Bryan and this early-day church. A careful reading of the *Petition* shows that the sentence, "St. John the Baptist Catholic Church in Edmond was the *first* church established in the Oklahoma Territory after the Land Run" is put in juxtaposition with a sentence describing the cross without any statement of the connection between them. But even if it were relevant for the "effect" or "endorsement" test, there is nothing in the Seal itself that signifies any historical relationship between this particular Catholic church structure and the cross on the Seal.

REASONS FOR DENIAL OF THE WRIT

I. A CITY SEAL THAT INCORPORATES A "VISIBLE AND CLEARLY DEFINED" LATIN OR CHRISTIAN CROSS IMPERMISSIBLY PROMOTES AND ENDORSES AN ESTABLISHMENT OF RELIGION WHEN THE CITY: OBTAINS TRADEMARK REGISTRATION FOR THE SEAL TO PERPETUATE ITS EXCLUSIVE USE BY THE CITY; PROMOTES IDENTIFICATION OF THE SEAL WITH THE CITY BY USING THE SEAL ON CITY CORRESPONDENCE, DOCUMENTS AND VEHICLES; AND USES THE SEAL TO EXCLUSIVELY IDENTIFY CITY PROPERTY AND PERSONNEL.

The appearance of the Latin cross on the Edmond Seal is an unquestioned government originated representation. There should be no confusion that it is identified with the City since the district court recognized it was adopted for the very purpose of identifying ". . . city property or personnel . . . used on city property, stationery and uniforms." (*Pet. Writ Cert.*, p. 21a)

Moreover, the City trademarked the Seal under Oklahoma Law (*Pet. Writ Cert.*, p. 5a) to secure its distinctive identification with the City to the exclusion of others.[16] It is this exclusive identification that communicates the idea of "endorsement." See *Allegheny County*, 492 U.S. 573, 109 S.Ct. 3086, 3104, 106 L.Ed.2d 472 (1989)("No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the 'display of the creche in this particular physical setting,' . . . the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." (Blackmun, majority, 492 U.S. at 600)

There should also be no confusion that a Latin cross symbolizes the Christian religion almost exclusively. The Tenth Circuit determined the Christian cross to be ". . .a very familiar religious symbol" (*Pet. Writ Cert.*, p. 12a, Footnote 9, 68 F.3d at 1231) Nor is there any doubt on the issue in several of the other circuits or the district court in this case.[17]

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[16]Although there were numerous examples of the Seal used in the trial, a few are referenced in the Appendix of this *Response* including the City's Trademark registration. (*Res. Appdx.*, pp. 3a-5a, 6a)

[17]A "Latin" cross is ". . a cross whose base stem is longer than the other three arms." *Harris v. City of Zion*, 927 F.2d at 1403 ". . . It is an essential symbol of the Christian faith." *Harris, id.* (". . .there is no doubt that the

(continued...)

The Tenth Circuit followed this Court's teaching from *Allegheny County* that "particular physical setting" is relevant:

> I agree that the creche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that

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[17](...continued)
structure in front of the building is a Latin cross. There also can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today.") See also *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 271 (7th Cir., 1986)("The plaintiffs testified--what is anyway obvious--that the Latin cross (a cross whose base stem is longer than the other three arms) is a symbol of Christianity"); See *Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1418 (7th Cir., 1993)("But we are masters of the obvious, and we know that the crucifix is a Christian symbol . . . In fact, the crucifix is arguably the *quintessential* Christian symbol because it depicts Christ's death on the cross and recalls thoughts of his passion and death.")

This singular significance was also recognized by the district court in the instant case in its Order on partial summary judgment ("There is no genuine dispute that the Latin cross is a symbol of Christianity")(R/A, Doc. 61, p. 4, Order, Filed 5/13/1994), and by at least one justice of this Court, see *Pinette*, 115 S.Ct. at 2466, Footnote 3 (Steven, J. dissenting)("Indeed, the Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity. See *American Civil Liberties Union v. St. Charles*, 794 F.2d 265, 271 (7th Cir., 1986) ('Such a display is not only religious but also sectarian. This is not just because some religious Americans are not Christians. Some Protestant sects still do not display the cross.... The Greek Orthodox church uses as its symbol the Greek (equilateral) cross, not the Latin cross.... [T]he more sectarian the display, the closer it is to the original targets of the [establishment] clause, so the more strictly is the clause applied' ").

they are favored members of the political community. In contrast to the creche in *Lynch* [*v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)] which was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, this creche stands alone in the county courthouse. **The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community**." *Lynch*, *supra*, at 692, 104 S.Ct., at 1369 (concurring opinion). See also *American Jewish Congress v. Chicago*, 827 F.2d 120, 128 (7th Cir., 1987)("Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity"). The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.

> *Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. at 626-27 (O'Connor, concurring) (emphasis added)

Petitioners contend that the appearance of the cross conveys no such message. Such a position ignores the practical reality of how symbols are used in our everyday life.[18]

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[18]"The practical reality is that seals, like flags and other emblems, **do have**
(continued...)

Petitioners state, "Respondents' testimony at trial showed, and they for the most part admitted, that they exhibit unique sensitivities with respect to the personal offense they claim to experience at the sight of the cross on the City Seal." (*Pet. Writ. Cert.*, p. 3, also see p. 13) This statement of Petitioners is most illustrative of the problem in Edmond.[19] That Petitioners

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[18](...continued)
a very distinctive communicative nature. We are conditioned to look for these relationships in the common symbols of our everyday life:

> The Court for decades has recognized the communicative connotations of the use of flags. *E.g., Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). In many of their uses flags are a form of symbolism comprising a 'primitive but effective way of communicating ideas . . .,' and 'a short cut from mind to mind.' *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.
>
> *Spence v. State of Washington*, 418 U.S. 405, 410, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842, 846-7 (1974)

In *Spence*, this Court also discusses the importance of the context in which the symbol is used for expression. The significant importance in the instant case is that the context is a city seal and not some other use such as a public park where others might expect the speech to not be so exclusively reserved to the state. To that extent, the Tenth Circuit's decision is not inconsistent with *Capital Square Review and Advisory Bd. v. Pinette*, 30 F.3d 675 (6th Cir., 1994) *affirmed*, 115 S.Ct. 2440 (1995)(Klu Klux Klan, a private organization, allowed to erect Latin cross in City Square).

[19]Petitioners also state, ". . . Respondents . . . view all religious symbology (continued...)

would characterize nonchristian Plaintiffs' objections to the inclusion of a "Latin" or "Christian cross" on an official seal as a "unique sensitivity" demonstrates vividly the intolerance of which Plaintiffs complain. It is just inexplicable why Petitioners would mention this in a Petition to this Court after they "stipulated" to standing.[20]

Silently ignoring sacred traditions of Native Americans, Jews, and other religious believers, as well as of persons such as Deists whose religious belief, doubt, or disbelief cannot be so simply classified, Petitioners seem to equate "**our** religious heritage" (*Pet. Writ Cert.*, pp. 8-9, (emphasis added) citing *Lynch*, 465 U.S. at 676-77) only with Christianity by the way they invoke *Lynch* for the principle that in some circumstances government may permissibly commemorate the "religious symbology [of] our nation's foundational institutions [:] . . . references to **our** religious heritage are found in the national motto ('In God We Trust') . . . as well as in the language of

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[19](...continued)
as offensive and inappropriate. . . " (*Pet. Writ Cert.*, p. 13) The suggestion is that Plaintiffs are not spiritual or religious. This is a misrepresentation. Robinson is a minister in the Unitarian faith. Battles and Miller are members of Channing Unitarian Church, which Robinson pastors. (Tr. 50, 80, 99) Feldman is a Jew who once attended Bible studies at a local Baptist Church because of a curiosity regarding religion. (Tr. 21) Their objection to the Seal is not an objection to "all religious symbology" but to a government excluding them by sponsoring a symbol inconsistent with their religious beliefs.

[20]Of course, parties cannot "stipulate" to jurisdiction. See *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986)("Federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it"). It would be more appropriate to suggest that Defendants chose not to contest either "standing" or "jurisdiction" (Tr. 20, 30, 49, 79, 117).

the Pledge of Allegiance to the American flag" (emphasis added). References to the cross may be equivalent to references to "God" for those who believe Jesus and God were one. For others, of ordinary sensitivity, they are not, and government's equating them with each other conveys a message of exclusion. These Petitioners, for example, see no reason why Jewish Plaintiff Martin Feldman should object to monthly delivery of his own "up close and personal" copy of a Christian cross on his City water bill or why he should feel excluded as a result of receiving it. See *Allegheny County* (Justice Blackmun, majority opinion 492 U.S. at 595 and O'Connor, concurring opinion at 492 U.S. at 625) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.")

For the most part, the "unique sensitivity" of Wayne Robinson, Curtis Battles and Wendell Miller derives from the particular religious ethic suggested by the cross itself, that of "blood sacrifice."[21] The intolerance Petitioners convey by

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[21]Robinson objected to the use of the cross because of his view that it misrepresented the life of Jesus:

17 A. Well, I have a personal and theological argument, a very
18 deeply personal one, that the cross, as presented by the
19 Christian community, is a distortion of the life and death of
20 Jesus of Nazareth. My own reading of our -- of human beings'
21 religious evolution is that there was a time when human beings
22 attempted to relate to God through sacrifices. If the earth
23 quakes and floods and disease had come, you offered a lamb, you
24 offered a goat, you offered a bird, you offered some kind of
25 sacrifice that hopefully, if offered in a well-intentioned
1 sense, would cause God to forgive and to no longer cause the

(continued...)

[21](...continued)

2 floods and so forth to come.
3 But around 500 years Before the Common Era, there was a
4 universal development, Pathagrasa• in Greece, Buddha in India,
5 Confucius in China, the Prophets of Israel, in which instead of
6 offering sacrifices, the message was take responsibility for
7 your life. In fact, the Prophet Isaiah says, "What does it
8 matter if you offer 10,000 sacrifices?"
9 Micah says, "What does the Lord require but to love mercy
10 and walk humbly come before God." And so when Jesus came
11 along, he was in the line of the prophets who was offering
12 course corrections to the detours that people of faith had
13 taken. And so he said -- you've heard an eye for an eye, a
14 tooth for a tooth. He said, "I say unto you, if they strike
15 you on one cheek, turn to them the other cheek. If they try to
16 compel you to go one mile, offer to go two miles. If they try
17 to take your coat, give them your cloak. If they curse you,
18 pray for them. And if they despitely use you, bless them."
19 Well, that was a different understanding from what those of
20 the religious faith in Israel were accustomed to. And that
21 message attracted, evidently, according to the records we have,
22 attracted a great following and people thronged to hear this
23 new understanding of basically non-violence and love for
24 others.
25 When Jesus died, though, because of his message which came
1 into conflict with the religious authorities, the followers of
2 his, as that began to evolve, reverted back to an old earlier
3 form of using sacrifice for our way of relating to God, not
4 self responsibility, but seeing Jesus as "the lamb slain from
5 the foundation of the world" and he would atone for our sins,
6 rather than we correcting our lives by ourselves.
7 And consequently, then, the cross became the quintessential
8 symbol of Jesus' death on the cross whereby his blood became
9 the way that an angry God no longer was angry, and thereby
10 Jesus atoned for our sins, and if we come and confess them
11 through Jesus to God we will be saved from the fiery depths of
12 hell and enter into heaven.
13 But it seems to me that's diverting the message of Jesus,
14 because the message of Jesus was not let someone else take
15 responsibility, it's take responsibility yourself. And the
16 cross became the symbol of that distorted way.

(continued...)

their reference to Respondents' "sensitivity" is that Petitioners' refusal to remove the cross from the government's official emblem is justified because Wayne Robinson's and the other Plaintiffs' desire to void governmental sponsorship of religious symbols antithetical to their beliefs arises only from their "unique sensitivities" (*i.e.*, nonchristian beliefs).

What is the standard in this Court by which these symbolic contexts are judged? In *Allegheny County*, five members of this Court identified as relevant for determining unconstitutional endorsement the ". . .likely reaction of a 'reasonable observer'." See *Capitol Square Review and Advisory Board v. Pinette*, (opinion of Stevens, J., dissenting) 115 S.Ct. 2466, Footnote 4 (citing *Allegheny County*, 492 U.S., at 620, 109 S.Ct., at 3115 (opinion of Blackmun, J.); *id.*, at 635-636, 109 S.Ct., at 3123-3124 (opinion of O'Connor, J.); *id.*, at 642-643, 109 S.Ct., at 3127 (opinion of Brennan, J., joined by Marshall and Stevens, JJ.).[22]

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[21](...continued)

Tr. 118-20 (Robinson)

(*The witness probably intended a reference to "Pythagoras")

[22]As the Tenth Circuit noted in Footnote 8, *Friedman v. County of Bernalillo County* was cited with apparent approval by Justice O'Connor in her concurring opinion in *Allegheny County*, 492 U.S. at 629, as well as by Justice Kennedy in his opinion concurring in the judgment in part and dissenting in part. *Id.* at 661.(". . . no doubt, for example, . . . the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of the city hall, . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.") The reference also included "*American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir., 1983)(cross erected in public park); *Lowe v. Eugene*, 254 Ore 518, 463 P.2d 360 (1969)(same)."

The religious effect test standard does not even require a direct connection between a government action and a tangible benefit to religion to render the challenged act unconstitutional. See *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d at 781, ("In addition, the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough. See *Larkin v. Grendel's Den*, 459 U.S. 116, 125, 103 S.Ct. 505, 511, 74 L.Ed.2d 297 (1982)")

Finally, Petitioners confuse "neutrality" with "hostility."[23] This case is not about some right of "free exercise" of Edmond's other citizens to enjoy a view of their sacred symbol in close association with governmental authority.[24] That is what the *Establishment Clause* is all about. Indeed, it is clear that the *Establishment Clause* can be a substantial reason to impose restrictions on free speech or free expression rights.[25]

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[23]See ". . . the Tenth Circuit's decision *requires* hostility toward religion. Under the Tenth Circuit's decision, it is only *religious* symbols that must be excised from the seals. The impact of such a decision is far-reaching and unconstitutional." *Pet. Writ Cert.*, p. 11. Petitioners' unstudied view ignores the purpose and prophylactic effect of the *Establishment Clause*.

[24]See *Pinette*, 115 S.Ct. at 2446 ("It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State. *Postal Service v. Council of Greenburgh Civic Associations*., 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983)").

[25] See *Pinette*, 115 S.Ct. at 2446, "There is no doubt that compliance with the *Establishment Clause* is a state interest sufficiently compelling to justify content-based restrictions on speech. See *Lamb's Chapel [v. Center Moriches Union Free School Dist.]*, *supra*, at [508 U.S. _____], 113 S.Ct., [2141] at

(continued...)

Although Defendants falsely argue Plaintiffs harbor some ill-will toward Christianity, from another view, the Edmond Seal is arguably offensive to persons of sincere Christian devotion. Given the primacy of the cross as a quintessential Christian religious symbol, its appearance on the Edmond Seal as no more than an "equal" to other, secular symbols is a heresy just as incongruous as money lenders in the temple. See *John 2:14-16 (King James)*. But if Petitioners deny this and claim the cross is more "equal" than the other symbols, they proffer the very evidence that sustains Respondents' point in this litigation.[26]

II. A "DIVISION" IN THE CIRCUITS? NOT REALLY. THE ONLY "BRIGHT LINE RULE" IN THIS CASE IS THE TENTH CIRCUIT'S REFUSALS TO RECONSIDER ITS PRIOR PRECEDENT OR TO REACH BEYOND "PRINCIPLED DISTINCTION" AND DISTINGUISH THIS CASE FROM ITS PRIOR DECISIONS OR THOSE OF THE SEVENTH CIRCUIT.

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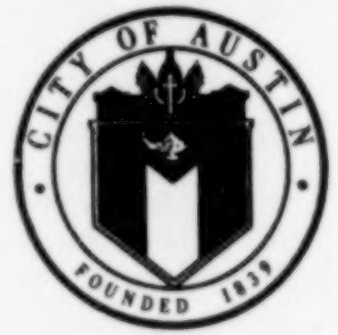
[25](...continued)
2148-2149, [124 L.Ed.2d 352 (1993)]; *Widmar*,[*v. Vincent*, 454 U.S. 263,] *supra*, at 271, 102 S.Ct. [269], at 275, 70 L.Ed.2d 440 (1981)."

[26]The clearest examples of those who would commandeer the Edmond Seal as a representative forum for their Christian beliefs are the numerous letters from City patrons introduced into evidence that claim some preference or right to display the Seal as a part of their "free exercise right." These letters are in the record and too numerous to reproduce here. (Plaintiffs' Exhibits 61 to 110) To blunt the effect of these exhibits from "reasonable people" who thought they were entitled to draw the inference that the City Seal represented their free exercise of religion, Randel Shadid, the Mayor, characterized these people as "zealots." (Tr. 274, 282, 285, 300)

Defendants contend the Tenth Circuit has divided the circuits because it imposed a "bright line rule" that any religious reference on a seal is unconstitutional.[27] The Tenth Circuit's decision creates no such test. The only "bright line" it recorded was a refusal to immerse itself in minutiae in an effort to somehow distinguish the Edmond Seal from those in *Friedman v. Board of County Commissioners of Bernalillo County*, *Kuhn v. City of Rolling Meadows* or *Harris v. City of Zion*, "We too decline to hold that **some visible and clearly defined religious images are permissible while other identically visible religious symbols are not**." (*Pet. Writ Cert.*, p. 17a)(emphasis added)

Such a position honors precedent and avoids result-oriented decisions. The distinction between a "clearly defined religious image" and one that is not can be ascertained, perhaps, by a simple review of the Bernalillo County and Austin City seals:

Friedman v. Board of County Commissioners of Bernalillo County



Murray v. City of Austin

After comparison, it is at least arguable that the Tenth Circuit's decision in *Friedman v. Bernalillo County* and Fifth Circuit's decision in *Murray v. City of Austin* do offer a "principled distinction." Regardless, whatever that distinction may be does

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[27]Defendants complain, "The Tenth Circuit has now attempted to make the determination easy by singling out *all* visible and clearly defined religious symbols as unconstitutional." (*Pet. Writ Cert.*, p. 14)

not require the superintending force of this Court to "steer" toward some unknown standard that Edmond seeks to impose.

If the circuits seem divided, it is because different facts can produce different results. Once these seals are compared, there should be no surprise the results in *Robinson*, *Harris v. City of Zion* and *Kuhn v. Rolling Meadows* are the same.

Regardless, it should not require a minute comparison of the Fifth Circuit's decision to those of the Tenth and Seventh Circuits to see that the alleged "division" is simply nonexistent, at least from the point of view of the Fifth Circuit.

Harris v. City of Zion

Kuhn v. City of Rolling Meadows

From another view, Defendants' complaint is not that the Tenth Circuit divided with the Fifth Circuit, but that it failed to divide with the Seventh Circuit.

The first step in this comparison is a review of the Tenth Circuit's holding regarding the "effects" test:

> In applying this "effects" test, we must consider the "'particular physical setting'" of the challenged action. *Foremaster*, 882 F.2d at 1491 (quoting *Allegheny County*, 492 U.S. at 597). Further, we evaluate the effect "by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action." *Friedman*, 781 F.2d at 781; see also, *Foremaster*, 882 F.2d at 1491 ("We inquire what an average observer would perceive when viewing the action of the City.").

> *Robinson v. City of Edmond*, 68 F.3d at 1229, 1995 WL 611332 at *3, (Applt. Appdx., p. 8a)[28]

Compare this with the specific holding of the test identified as key by the Fifth Circuit in *Murray*:

> The effect of the displays was analyzed under the earlier referenced endorsement test urged by Justice O'Connor in her concurrence in *Lynch*. Specifically,
>
> > [t]he effect of a display [or use of religious symbolism] depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears. . . Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.
>
> *County of Allegheny*, 492 U.S. at 595, 109 S.Ct. at 3102 (brackets in *County of Allegheny*)(citations omitted). To be considered is whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 597, 109 S.Ct. at 3103 (quoting *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985)). The greatly differing views in *County of Allegheny* notwithstanding, it

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[28]Of course, even if Petitioners show a difference between the results reached by the Fifth, Tenth and Seventh Circuits, this case would still not be appropriate for certiorari when each of these circuit courts have applied the same rule of law, albeit from arguably different perspectives. Correct statements of the law, even if misapplied, are not sufficient reason to expend this Court's scarce resources, as the most recent amendments to this Court's rules spell out with unmistakable clarity. See **Rule 10**, *infra*. Footnote 9.

appears that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* "Under the endorsement test, the 'history and ubiquity' of a practice is relevant ... because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny*, 492 U.S. at 630, 109 S.Ct. at 3120 (O'Connor, J., concurring in part and in the judgment).

In light of the guiding Supreme Court case law, and giving special consideration to the endorsement test used in *County of Allegheny*, we decline to hold that any time a municipality incorporates a religious symbol within its seal, insignia, or logo--regardless of the history, purpose, or context--the *Establishment Clause* is violated. To do so is inappropriate in the difficult area of *Establishment Clause* analysis dominated by subtle nuances, and it accords too little deference to both our nation's religious and cultural heritage and practices and the Supreme Court's guidance. In holding that Austin's insignia does not violate the *First Amendment*, we recognize that two of our sister circuits have found establishment clause violations when municipal seals included religious symbolism. **We do not view this as a split with our circuit**. Instead, it is further evidence, as discussed in *Lynch*, for example, that such cases must be decided on their facts.

Murray v. City of Austin, 947 F.2d at 157. (emphasis added)[29]

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[29]Indeed, the Fifth Circuit goes on to analyze *Harris*, *Kuhn* and *Friedman*, concluding that each of the seals in these cases arguably endorses an establishment of religion in their particular context, again reiterating a determination that Murray's instant holding was not inapposite to that of (continued...)

Upon this test, the "facts" the Fifth Circuit identified as critical are those embodied in the seal itself. In so holding, the Fifth Circuit found the seal not sufficiently remarkable in its context to constitute a violation of the *Establishment Clause*, an arguable and rational determination given the particular physical context of the cross in contrast to the seals in *Harris v. City of Zion*, *Kuhn v. Rolling Meadows* and *Friedman v. Board of County Commissioners of Bernalillo County*.

In this same context, the Tenth Circuit is saying is that the setting of the cross on the Edmond Seal in its proportion commands no "principled distinction" with prior precedent of the Tenth or Seventh Circuits. It is not only logical, but reasonable that the result should be the same.

Is there a "critical mass" of "setting" that triggers an *Establishment Clause* violation? The Fifth Circuit thinks so and the Tenth Circuit has no doubt, at least with regard to the Edmond Seal. A visual demonstration explains this reference. If the Edmond Seal were shrunk to a size and proportion that most Edmond citizens might view while driving into town, on City vehicles or on City buildings, letterhead or envelopes, we quickly demonstrate that the cross is the dominant identifiable image long after the other images shrink into obscurity:

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[29](...continued)
those three cases. See *Murray*, 947 F.2d at 157. (". . . we do not view our decision as conflicting with *Friedman*.") Nor did the Fifth Circuit view the Seventh Circuit's decision in *Kuhn* as a "bright-line" test. 947 F.2d at 157 ("However, we do not read *Harris* to hold that any use of a cross in a seal would cause the same result.")

In short, Edmond's claimed specter of "criss-crossing" conflicts is an "apparition" that only they fear and is not visible to the Fifth Circuit.

The "objective observer" may not always have the full context of the Appendix Exhibit to *Robinson*. (See *Res. Appdx.*, p. 2a) The reduced reference will more probably be the norm than the studied consideration of the full exhibit. In such context, the wisdom of the Tenth Circuit's decision is clear.

Regardless, in the world of "objective analysis," we cannot conclude a mere difference in result is the product of different tests under the law. It seems relatively clear that the Tenth Circuit, Seventh Circuit and the Fifth Circuit all applied the same or similar tests. The results differ because, as is so often the case, the facts are different.

CONCLUSION

The City of Edmond has adopted, trademarked, sponsored, and laid exclusive claim to an emblem which inculcates a symbol that is unmistakable in its identification with the Christian religion. The City then uses that emblem in a manner that promotes a unique identification between the City and that emblem. It requires little analysis and only minimal understanding of the nature of advertising to detect thinly veiled advancement of Christianity by the distinctive emblem.

That the Edmond Seal incorporates other images does not save it under *Lynch*. The primary effect (and not a 51% "effect" of balancing religious symbols with secular symbols) is that of promotion of a religious symbol. In short, although Defendants propose that they can mix "water" and "wine" and get "water," they cannot. The result in the instant case is not "water" but "diluted wine" that is still unmistakably wine. In either case, such symbolism, as a form of "Christian-lite," should be equally unpalatable to Christians and nonchristians alike.

Accordingly, Respondents respectfully request that this Court deny Edmond's *Petition* to review the decision of the Tenth Circuit, a decision in accord with the Circuit's own precedent, not in conflict with precedent from other circuits and

consistent with the decisions of this Court. In the event that this Court should accept certiorari, Respondents would urge the affirmance of the Tenth Circuit's decision upon the same reasons and circumstances.

Respectfully submitted,

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Martin Feldman

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Plaintiffs' Exhibit 50 - Lapel Pin purchased from city funds by City Manager Max Speegle and distributed to all city employees and to others on behalf of City (Approximate actual size) 3a

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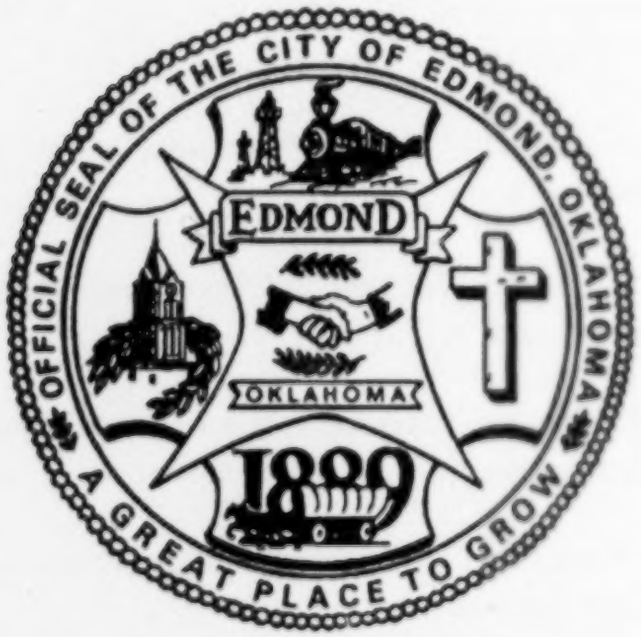

(**Plaintiffs' Exhibit 49** - Property Sticker used to identify all City property (Approximate actual size))

City Property Sticker
Plaintiffs' Exhibit 49

(**Plaintiffs' Exhibit 50** - Lapel Pin purchased from city funds by City Manager Max Speegle and distributed to all city employees and to others on behalf of City (Approximate actual size))

Lapel Pin
Plaintiffs' Exhibit 50

(**Plaintiffs' Exhibit 47** - Shoulder Patch worn by Edmond City Police Officers)

Police Shoulder Patch
Plaintiffs' Exhibit 47

(**Plaintiffs' Exhibit 32** - Welcome to Edmond Sign at north highway entrance to City)

Plaintiffs' Exhibit 32 (Excerpt)

(**Plaintiffs' Exhibit 33** - Welcome to Edmond Sign at north highway entrance to City - Close-up view)

Plaintiffs' Exhibit 33 (Excerpt)

(Plaintiffs' Exhibit 56 - Certificate of Registration of Trademark (excerpt))

OFFICE OF THE SECRETARY OF STATE
STATE OF OKLAHOMA

CERTIFICATE OF REGISTRATION OF TRADEMARK

REGISTRATION NO. 25568 **EXPIRES: March 26, 2003**

I, the undersigned Secretary of State of the State of Oklahoma, do hereby certify that by virtue of Application for Trademark Registration duly signed, verified, filed and registered this day in the Office of the Secretary of State, **CITY OF EDMOND**, whose business address is **100 E. First, Edmond, Oklahoma 73083**, is the legal registrant in Oklahoma for a term of ten years form (sic) the date hereof, of the following trademark of which said registrant claims ownership: **The Seal of the City of Edmond, which consists of two circles containing a border enclosing the words, "OFFICIAL SEAL OF THE CITY OF EDMOND, OKLAHOMA" and "A GREAT PLACE TO GROW". The area within the seal is divided into five areas consisting of four quadrants and a center area. In the center is a depiction of two hands shaking with olive branches above and below and two (Over)** in Class No. **100**, Class Name **Miscellaneous**, for use in connection with goods or services briefly described as follows: **Municipal services for the citizens of Edmond, Oklahoma**, and that a facsimile of said trademark, a copy whereof is attached hereto, has been duly registered in the Office of the Secretary of State as provided by law. The date claimed for the first use of said trademark anywhere is

September 1965 and the date claimed for the first use of said trademark in Oklahoma is **September 1965**.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State of Oklahoma at the City of Oklahoma City this **26th** day of **March**, 1993.

s/John Kennedy
Secretary of State

By: s/Sandy Burkham

(SEAL)

[reverse page - continued]

banners also above and below. The top banner contains the word "EDMOND" and teh (sic) bottom banner contains the word "OKLAHOMA". The bottom quadrant depicts a conestoga wagon superimposed with the number 1889. The left quadrant contains a depiction of the Old North Tower, encircled with a laurel wreath. The top quadrant depicts two oil derricks and a train. the right quadrant contains the depiction of a cross.

03/26/93 3:44PM 000#7868 A
TRADEMARK $25.00

[Seal Exhibit omitted]
[Certificate of Transcript omitted]

(Excerpts from **Plaintiffs' Exhibits 16, 19** and **21** - City Council Minutes for the City of Edmond in 1965)

Plaintiffs' Exhibit 16, Excerpt from City Council Minutes for July 6, 1965

July 6, 1965

The Edmond City Council met in regular session at 8 p.m. at the City Hall with Mayor Charles E. Johnson presiding. The City Manager, City Attorney, Councilmen Yoesting, Johnson, and Teuscher were present. Councilman Priest was absent.

Minutes of the previous meeting were read and approved.

Motion by Yoesting, seconded by Johnson, that authorization be given THE EDMOND SUN to sponsor a contest for official Edmond seal, and instructed the City Manager to budget $75 prize money. Motion carried, with Mayor and all Councilmen present voting aye.

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Plaintiffs' Exhibit 19, Excerpt from City Council Minutes for August 16, 1965

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Motion by Johnson, seconded by Teuscher, that the appointment of the following persons to serve as judges of the Edmond Official Seal Contest be approved. Motion carried, Mayor and all Councilmen voting aye.

Mrs. Carl Alcorn, 607 Timber Lane
Mrs. Dixie Clegern, 624 Timber Lane
Mrs. E. E. Griffin, 635 Timber Lane
Mrs. Wayne S. Nichols, 800 East Drive
Mr. Joe C. Jackson, 319 E. 13th St.

- - - - -

Plaintiffs' Exhibit 21, Excerpt from City Council Minutes for August 17, 1965 Special Meeting

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The Mayor appointed Mr. Frank Dobyns to replace Dr. Joe C. Jackson who is on vacation and unable to serve as judge of the Edmond Official Seal Contest. Motion by Priest, seconded by Johnson, that said appointment be approved. Motion carried, Mayor and all Councilmen voting aye.

Plaintiffs' Exhibit 21, Excerpt from City Council Minutes for September 7, 1965

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Mayor Charles E. Johnson awarded Edmond Seal Contest prizes to Mrs. Don Bryan and Mrs. Jon Wright.

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(Excerpts from **Plaintiffs' Exhibits 122, 123, 124, 125** and **126** - Newspaper Stories from Edmond Sun and Edmond Booster from 1965)

Plaintiffs' Exhibit 122, Excerpt from Edmond Sun, Tuesday, July 13, 1965, p. 1, col. 2.

Edmond seal contest slated

A contest, backed by the local governing board, will open here Thursday to design and select an official seal for the City of Edmond.

And there are substantial awards in the offing for the three best seal designers. Designer of the winning seal contest entry will receive a $50 U.S. savings bond, and $25 bonds will go to the designers of the second and third-place awards.

Mayor Charley Johnson proposed the contest at a recent council meeting. "We need an official seal to decorate our city hall stationery, and to be flown as a flag in front of our city hall," he explained. Council promptly endorsed the suggestion and appropriated the money to furnish the savings bond awards.

The contest period is July 15 through August 15. Entries should be mailed or brought to the Edmond Publishing Co. office at 13 S. Broadway. The entry designs should be done with black India ink on the whitest paper available. The entries should not exceed 8 1/2 x 11 inches, maximum size.

The designer may, if he wishes, attach a separate sheet explaining the symbolism or meaning of the various drawings contained in his design.

Mayor Johnson said local artists and possibly a historian will be invited to judge the contest entries.

Entry deadline, remember, is August 15.

Plaintiffs' Exhibit 123, Excerpt from Edmond Booster, August 5, 1965, p. 1, col. 1, Vol. 41, #20.

Deadline nears for entries in city seal design competition

Area sketchers and local history buffs are apparently ignoring a chance to pocket a $50 or $25 saving bond . . . there have been only two entries received to date in the current contest to design an official seal for the City of Edmond.

The contest ends August 15. City officials are seeking designs for a seal to be used on city stationery, official documents and for a city flag.

Contest entries should reflect the factors which make Edmond the finest small city in Oklahoma -- her birth in the Run of '89, the college, and the culture, commerce, agriculture and downright friendliness of her people.

Entries may be submitted at the EPCO publishing office, 13 S. Broadway, and should be of 8 1/2 x 11 maximum size.

Plaintiffs' Exhibit 124, Excerpt from Edmond Sun, Tuesday, August 17, 1965, p. 1, col. 4.

Contest closed, judges picked

Hopeful seal designs for an official city insignia were accepted by the council Monday night with the closing of the recent 30-day contest.

The council received 11 entries in the contest, and promptly named five judges to pick the three winners.

Selected to judge the entries were Dr. Joe C. Jackson, dean of Central State and prominent Oklahoma historian; art instructor Mrs. Carl (Kathryn) Alcorn; long-time city residents Mrs. Dixie Clegern and Mrs. E. E. Griffin; and artist Mrs. Wayne (Gaye) Nichols.

The contest was sponsored by the Edmond newspapers, and prizes are being furnished by the city. First prize is a $50 U.S. savings bond, and second and third prizes are $25 bonds.

The contest was promoted to select an official seal for the City of Edmond to use on city stationery and as the design for a city flag.

Most of the entries stressed Edmond's cultural and commercial factions, its "churchiness," and the friendliness of its residents.

Almost all the entries included in their designs a sketch of Old North tower.

Entries were deposited with City Clerk Woody Bryan to be turned over to the judging committee.

Awards will be announced and presented at the earliest possible date, said Mayor Charlie Johnson.

Plaintiffs' Exhibit 125, Excerpt from Edmond Sun, Tuesday, August 31, 1965, p. 1, col. 2.

Art student has design winners

An Edmond area housewife who once attended the Kansas City Art Institute on scholarship is first place winner in the recent contest to design an official seal for City of Edmond.

She is Mrs. Don (Frances) Bryan, of 54 W. Shore Drive, who actually won two awards. She submitted two entries (there was no restriction on number), and also won third place in the contest.

Second place winner is an Edmond schoolteacher, Mrs. Jon (Caralee) Wright, 119 E. Hurd, who teaches first grade at Dougherty elementary.

Prizes are a $50 savings bond for first place, and $25 bonds for second and third.

Mrs. Bryan and Mrs. Wright will receive their awards from Mayor Charlie Johnson at council meeting next Tuesday night.

Mrs. Bryan is church school superintendent of St. Joseph's Episcopal, and when invited to appear for the awards presentation, noted that she "can make it, but I'll have to hurry right back to a church meeting." Her husband works at Tinker field, and their daughter attends Clegern gradeschool.

Mrs. Wright has taught at Dougherty for the past four years. She took her BA in education at Central State in 1962, and recently was granted her Masters in elementary education at the same school.

Plaintiffs' Exhibit 126, Excerpt from Edmond Sun, Tuesday, September 7, 1965, p. 1, col. 3.

Seal Contest Awards To Be Made

Council to Hear Progress Report

- - - - -

(Excerpt from story)

First business on the agenda, said Johnson, is presentation of awards to the winners in the recent city seal contest.

Two housewives (one a city schoolteacher) are the award winners. Mrs. Don (Frances) Bryan, of 54 W. Shore Drive, won both first and third places in the contest, and the second place award went to Mrs. Jon (Charalee) Wright, of 119 E. Hurd, who teaches at Dougharty (sic) gradeschool.

Mrs. Bryan won a $50 and a $25 savings bond for her entries, and Mrs. Wright will also receive a $25 bond.

Judges, who did not know the names of the contest entrants, included Mesdames E. E. Griffin, Dixie Clegern, Garland Godfrey and Wayne Nichols, and Frank Dobyns.

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(3)

SUPREME COURT OF THE UNITED STATES

CITY OF EDMOND ET AL. *v.*
WAYNE ROBINSON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 95–879. Decided May 13, 1996

The petition for a writ of certiorari is denied.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I dissent from the denial of certiorari. Petitioners identify a division between the Courts of Appeal about whether a city violates the First Amendment when its seal includes as one component a religious symbol, in particular a Latin cross. Compare 68 F. 3d 1226 (CA10 1995) and *Harris* v. *City of Zion*, 927 F. 2d 1401 (CA7 1991) (finding an Establishment Clause violation) with *Murray* v. *City of Austin*, 947 F. 2d 147 (CA5 1991), cert. denied, ___ U. S. ___ (1992) (finding no violation). Their petition also suggests—though it does not expressly raise—a serious question about respondents' standing to press their First Amendment claim.

The Court of Appeals observed that neither party disputed respondents' standing, but correctly observed that "standing" was always necessary. 68 F. 3d, at 1229, n. 6. Last Term, we pointed out that "[t]he question of standing is not subject to waiver: 'We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.'" *United States* v. *Hays*, ___ U. S. ___ (1995) (slip op., at 5) (quoting *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990)).

The Court of Appeals noted respondents had standing under its decision in *Foremaster* v. *City of St. George*, 882 F. 2d 1485, 1490 (CA10 1989), cert. denied, 495 U. S. 910 (1990). 68 F. 3d, at 1229, n. 6. In *Fore-*

master, the Court of Appeals inquired whether a plaintiff challenging a city logo containing a depiction of the local Mormon temple alleged a direct injury when he alleged that he was "confronted by the logo on a daily basis." 882 F. 2d, at 1491. Reviewing our decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), the court held that "an allegation of direct personal contact with the offensive action alone" alleged a direct injury, and that it was not necessary for a plaintiff to allege also that "he has altered his behavior as a consequence" of the offensive action. 882 F. 2d, at 1490.

The only factual statement as to what injury respondents in the present case might have suffered is that "[p]laintiffs are non-Christians who live or work in Edmond." 68 F. 3d 1226, 1228. Mere presence in the city, without further allegations as to injury, quite clearly fails to meet the standing requirements laid down in cases such as *Valley Forge*. There, we said:

> "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . ." 454 U. S., at 485.

The *Foremaster* court acknowledged that there was disagreement among the Courts of Appeals about whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs. 882 F. 2d, at 1490; see also *Freedom From Religion* v. *Zielke*, 845 F. 2d 1463 (CA7 1988) (finding this allegation insufficient); *Saladin* v. *City of Milledgeville*, 812 F. 2d 687 (CA11 1987); *Hawley* v. *City of Cleveland*, 773 F. 2d 736 (CA6 1985) (finding it sufficient), cert. denied, 475 U. S. 1047 (1986). Because there are serious arguments on both sides of

this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' power of judicial review of State actions, I would take this opportunity to consider it.

For these reasons, I would grant the petition for certiorari and request the parties to address the additional question of whether respondents showed an injury in fact sufficient to give them standing to raise their claim of violation of the Establishment Clause of the First Amendment.